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Gender and Intercollegiate Athletics: Data and Myths

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GENDER AND INTERCOLLEGIATE ATHLETICS: DATA AND MYTHS

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This Article explores what nondiscrimination means in the context of intercollegiate athletics. After reviewing the Department of Education's controversial Title IX Policy Interpretation, it critically examines the analytical framework used in Title IX athletic cases and concludes that commonly made analogies to litigation under Title VII of the 1964 Civil Rights Act are inapt. A major part of the Article is an empirical study, looking first at gender equity plans written by institutions of higher education for the National Collegiate Athletic Association and then at data collected from more than 325 institutions pursuant to the Equity in Athletics Disclosure Act. Understanding Title IX and its application to intercollegiate athletics is another context in which to work out the meaning of equality. The purpose of college athletics is for students to learn the kinds of discipline, cooperation, and ability to meet challenges that often produce success in later public and private life. Women are disadvantaged because they are seen to lack these qualities. Giving women a chance to show they understand team play and competitive spirit would be a great accomplishment.

INTRODUCTION

As a new civil rights lawyer in 1975, my first assignment was to observe the hearings the House of Representatives was conducting on Title IX of the Education Amendments of 1972.[1] The Office for Civil Rights, where I had worked for one week, had the primary responsibility for writing the regulation that implemented the statute. The regulation and this hearing process posed several difficult issues. First, the regulation was much more detailed than any that the Office for Civil Rights in Department of Health, Education, and Welfare had ever written. Second, the regulation was subject

* Professor of Law, Indiana University School of Law. B.A. 1969, DePauw University; J.D. 1972, Indiana University at Bloomington. For five years (1993–98), I served as Dean for Women's Affairs for the Bloomington campus at Indiana University. One of the continuing interests of that office was gender equity in athletics. As Dean, I met with administrators at other Big Ten institutions whose jobs also included advocacy on women's issues. Both the criticism and support for various aspects of Title IX and its application to athletics were part of our discussions. Of course, the views expressed here are mine and not necessarily those of the Office for Women's Affairs or Indiana University. A special thanks to Ji Lie for her assistance with the data analysis.

1. 20 U.S.C. § 1681 (1994).

to a "legislative veto" then popular with Congress.[2] More importantly, however, it provided the first opportunity for public comment on the subject of gender discrimination and big-time intercollegiate athletics. By the end of the summer, Congress had failed to disapprove the regulation, so it took effect without subsequent legal battles.

For several reasons the regulation, referred to as the Title IX regulation,[3] did not really have an effect on intercollegiate athletics for more than fifteen years. First, there was the expected caution of an administrative agency charged with applying and interpreting a new statute in an uncharted area. Second, there were legal attacks, challenging various provisions of the statute and its regulation on their face.[4] Finally, new avenues of redress became available, with the U.S. Supreme Court's ruling in 1992 that private plaintiffs may receive monetary damages for a violation of Title IX.[5]

Based on the actual experiences of more than 325 institutions of higher education, this Article explores what nondiscrimination means in the context of intercollegiate athletics under Title IX and whether institutions are in compliance with Title IX. Part I examines the controversial Title IX *Policy Interpretation*, which explains in detail how Title IX applies to intercollegiate athletics, and then presents two recent court decisions to illustrate opposing views about this official policy. This Part describes the proportionality test relied upon by plaintiffs, the lack of interest argument advanced by institutions, and the analysis of the federal courts in specific factual contexts. Part II critically examines the analytical framework used in Title IX athletic cases and concludes that commonly made analogies to litigation under Title VII of the 1964 Civil Rights Act are inapt. Part III considers the constitutional dimension of the athletics issue, including the implications of the Supreme Court's recent decision concerning single-sex education.

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2. The Title IX regulation was signed by President Gerald Ford on May 27, 1975, and submitted to Congress for review pursuant to section 431(d)(1) of the General Education Provisions Act (GEPA), which allowed Congress forty-five days in which to disapprove the regulation (codified at 20 U.S.C. § 1232(d)(1), repealed 1994, PL 103-382, § 247). Congress did not disprove the regulation and it became effective on July 21, 1975. Nondiscrimination on the Basis of Sex in Education Program and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. § 86.1 (2000).

3. 45 C.F.R. § 86.1 (2000).

4. *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 572 (1984) (holding that Title IX did not apply to programs that did not receive direct federal funds); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 539 (1982) (ruling that Title IX covered discrimination in employment in addition to discrimination against students); Cannon v. Univ. of Chi., 441 U.S. 677, 708 (1979) (holding that Title IX created a private cause of action).

5. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992).

Part IV presents an analysis of empirical data, looking first at gender equity plans written by institutions of higher education for the National Collegiate Athletic Association and then at data that I collected from more than 325 institutions pursuant to the Equity in Athletics Disclosure Act.[6]

Finally, the Article concludes that analogies between discrimination in athletics under Title IX and workplace discrimination under Title VII are inappropriate. Opponents of Title IX argue that Title VII's analytical framework should be used to interpret Title IX. They also argue that the Title IX *Policy Interpretation* and recent cases have turned Title IX into a quota statute; the Article contends that these critics misunderstand both the case law and the term "quota." Further, these opponents also fail to take into consideration the circumstances of today's intercollegiate athletics, with its focus on separate teams for women and men. These observers misplace their reliance on Title VII and fail to consider the factual differences in employment and athletics.

The Article also rejects four myths surrounding discussions of Title IX and intercollegiate athletics. First, opponents argue that football and Title IX compliance are mutually exclusive. Several articles have discussed the question in the abstract, but the data set forth in Part IV shows that schools with football programs do comply with Title IX. In fact, the existence of a football program may make it easier to have successful women's athletic programs. Second, opponents of Title IX claim that men's teams have been eliminated to pay for women's teams. The data submitted by higher education institutions, however, are not consistent with this claim. Third, opponents of Title IX claim that football and men's basketball pay for women's sports, and therefore, they should be excused from the requirements of Title IX. Football and men's basketball produce positive net revenues at some schools, particularly big-time programs, but they do not produce positive net revenues at smaller schools or at the big-time athletic programs that do not sponsor football. Even if all schools produced positive net revenues, there is no reason this factor should lead to exempting those men's sports. Fourth, opponents of the Title IX *Policy Interpretation* argue that declining athletic budgets mean that men will suffer in order to enhance women's teams or, in the alternative, that intercollegiate athletics will be enhanced at the expense of academics. The data suggests that, at least at many institutions, athletic budgets are not declining and thus can accommodate the goals of Title IX.

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6. 20 U.S.C. § 1092(g) (1994).

Understanding Title IX and its application to intercollegiate athletics is important for several reasons. On the immediate level, it means the difference between providing opportunities for women or not; the difference between enjoying equivalent athletic programs or not. On a more theoretical level, Title IX and its application to intercollegiate athletics is another context in which to consider the meaning of equality. Equality is an elusive concept, and it is crucial to have many different contexts in which to clarify the concept. Finally, equality in athletics is important for its own sake. Intercollegiate athletics does not exist simply to give athletes, fans, or supporters something to do on Saturday afternoon. Its purpose is for students to learn the kinds of discipline, cooperation, and ability to meet challenges that often produce success in later public and private life. Women are disadvantaged because they are seen as incapable of cultivating these qualities. Giving women a chance to show they understand team play and competitive spirit would be a great accomplishment.[7]

I. TITLE IX POLICY INTERPRETATION

A. The Statute and Rules

In 1972, Congress passed Title IX of the Education Amendments, which provides "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[8]

In 1974, Congress required the Secretary of Health, Education, and Welfare (HEW) to prepare and propose regulations to implement Title IX including, "with respect to intercollegiate athletic activities[,] reasonable provisions considering the nature of particular sports."[9] These original regulations have two provisions specifically applicable to athletics. First, there is a specific regulatory provision that speaks about athletic scholarships

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7. For general discussions of Title IX and intercollegiate athletics, see ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX (1994); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647; Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); Mark Kelman, *(Why) Does Gender Equity in College Athletics Entail Gender Equality*, 7 S. CAL. REV. L. & WOMEN'S STUD. 63 (1997).

8. 20 U.S.C. § 1681(a) (1994).

9. Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

within the more general section on financial aid.[10] The rule for athletic scholarships is similar to the general rule on financial aid: institutions must provide reasonable opportunities for such awards for men and women in proportion to the number of students participating in intercollegiate athletics.[11]

Second, there is the more general provision that outlines the equal opportunity requirements of Title IX for athletics programs, including the basic rule that institutions should not provide athletics separately on the basis of sex.[12] This section also states when separate teams are permissible (but not required) and provides a list of specific factors to consider in assessing whether equal opportunities are available in a particular athletic program.[13] In brief, the regulation says that in determining whether equal opportunities are available, the government will consider if the selection of sports and levels of competition effectively accommodate the interests and abilities of male and female students and if those students enjoy equivalent benefits, opportunities, and treatment within the athletic program.[14]

Finally, the regulation provides for a three-year adjustment period for institutions of higher education.[15] When this transition period ended in July 1978 and the Office for Civil Rights (OCR), the office within HEW that had the responsibility for enforcing Title IX, began to investigate complaints, the department decided further guidance was needed. The OCR proposed a policy interpreting Title IX's application to intercollegiate athletics in December 1978[16] and published a final *Policy Interpretation* in December 1979.[17]

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10. Athletic Scholarships, 45 C.F.R. § 86.37(c) (2000).

11. *Id.*

12. Athletics, 45 C.F.R. § 86.41(a).

13. Separate Teams, 45 C.F.R. § 86.41(b). The regulation provides that a university may offer separate teams for men and women "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." *Id.* The regulation continues, however, that if a university offers a separate team for members of only one sex and athletic opportunities are limited for members of the excluded sex, the university must allow members of the excluded sex to try out for the single sex team unless the sport involved is a contact sport. *Id.* § 86.41(c).

14. *Id.*

15. Adjustment Period, 45 C.F.R. § 86.41(d).

16. Title IX and Intercollegiate Athletics, 43 Fed. Reg. 58,070 (Dec. 11, 1978).

17. Title IX of the Educational Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). The 1979 Policy Interpretation is not a "regulation" as contemplated by the Title IX statute and thus is distinct from the Title IX regulation promulgated in 1975. The Policy Interpretation is the agency's interpretation of its own regulation. It does not have the force of law, but it is entitled to substantial deference. The difference between the statute, the regulation, and the Policy Interpretation is further discussed *infra* text accompanying notes 113–40, 184–92.

1. Title IX Policy Interpretation of 1979—The final *Policy Interpretation* gives specific meaning to the "equal athletic opportunity" requirement of the Title IX regulation and details the factors to be considered in assessing an institution's compliance with Title IX.[18] It is divided into three sections: financial assistance,[19] program components,[20] and access to athletic opportunities.[21] The *Policy Interpretation* reiterates that "proportionately equal amounts" is the guiding principle for athletic financial assistance.[22] Athletic scholarships should be given to men and women in proportion to the number of men and women participants in the institution's athletic program. The data discussed in Part IV show that this is the area in which institutions have made significant improvement, and many are in compliance.[23]

The second section of the *Policy Interpretation* states that "equivalence" is the guiding principle in determining compliance in program components, such as recruitment, equipment, travel, or practice times.[24] The OCR will compare the availability, quality, and types of benefits, opportunities, and treatment afforded male and female athletes.[25] The *Policy Interpretation* then details the factors OCR will consider in assessing compliance in a specific program area.[26] For example, the section on travel and per diem allowances states that compliance will be assessed by examining the equivalence for men and women of modes of transportation, housing furnished during travel, length of stay before and after the competitive event, per diem allowances, and dining arrangements.[27] This part of the *Policy Interpretation* also effectuates the

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In 1979, Congress divided the Department of Health, Education, and Welfare (HEW) into the Department of Health and Human Services (HHS) and the Department of Education. *See* 20 U.S.C. §§ 3401–3510 (1994) (describing the different responsibilities of HHS and the Department of Education). The Department of Education then reissued the Title IX regulation without change in 1980, and its Office for Civil Rights now has primary responsibility for enforcing Title IX. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 106 (2000).

18. Equal Opportunity, 45 C.F.R. § 86.41(c) (2000).

19. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

20. *Id.* at 71,415–17.

21. *Id.* at 71,417–18.

22. *Id.* at 71,415.

23. *See infra* note 395.

24. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,415–17.

25 *See id.*

26. *Id.* at 71,416–17.

27. *Id.* at 71,416.

Javits Amendment,[28] which requires the Title IX regulation to take into account "the nature of particular sports."[29] The section provides that institutions are in compliance with Title IX even if treatment, benefits, or opportunities are not equivalent, as long as those differences result from nondiscriminatory factors, such as rules of play, rate of injury resulting from participation, or the nature of facilities required for competition.[30] The *Policy Interpretation* specifically notes "differences involving such factors will occur in programs offering football, and consequently these differences will favor men."[31] Provided the institution meets the sports specific needs of both men and women, "differences in particular program components will be found to be justifiable."[32]

Information from institutional gender equity plans discussed in Part IV shows that this is also an area in which institutions have made significant improvements.[33] Some changes need to be made and can be readily implemented, such as standardizing the number of players per room on road trips, the per diem allowance during travel, and the means of transportation to games away from campus. Other changes are more difficult to implement or even to acknowledge as necessary. For example, it may be difficult to provide "equivalent" access to athletic facilities, especially if there is only one primary sports arena and only one "prime" practice time. The most difficult aspect in assessing compliance in this area is that, other than easily measured program components, compliance depends on information provided by current athletes. These men and women are understandably reluctant to complain or "go public" about possible program inequities, in part because disclosure could seriously jeopardize their intercollegiate athletic careers.

The third part of the *Policy Interpretation* implements the regulation's requirement that institutions select sports and levels of competition to effectively accommodate the interests and abilities of students.[34] This section states that OCR will assess compliance by examining the determination of athletic interests and abilities of students, the selection of sports offered, and the levels of competition available, including the opportunity for team

28. Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

29. *Id.*; *see supra* text accompanying note 9.

30. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,415–16.

31. *Id.* at 71,416.

32. *Id.*

33. *See infra* text accompanying notes 354–68.

34. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,417–18.

sports.[35] The *Policy Interpretation* gives institutions discretion on how to determine student interest, latitude to decide what sports to offer and sponsor, and a choice of integrated or sex-segregated teams.[36]

In contrast, the *Policy Interpretation* is fairly specific about determining levels of competition.[37] The basic rule in determining levels of competition is that institutions "must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities."[38] Institutions may comply in one of three ways: first, they can show that intercollegiate participation opportunities for male and female students are substantially proportionate to their respective enrollments; second, if participation rates are not substantially proportionate, the institutions can show a history and continuing practice of program expansion that is responsive to the student interests and abilities of the underrepresented sex; third, if neither of the two previous conditions is met, institutions can show that the present athletic program fully and effectively accommodates the interests and abilities of the members of the underrepresented sex.[39] Most court decisions about intercollegiate athletics have deferred to the *Policy Interpretation.*[40] Because the second and third options apply in limited situations, some commentators argue that these court decisions require institutions to use proportionality, ensuring that the number of athletes is substantially proportionate to the gender composition of its undergraduate population.[41]

2. *Proportionality*—This three-part test, used to determine whether an institution has effectively accommodated student interest and ability, is the most controversial part of the 1979 *Policy Interpretation.* Indeed, the casual observer might think that proportionate participation rates define compliance with Title IX. The fact that the *Policy Interpretation* adopts a bright-line definition of

35. *Id.* at 71,417.

36. *Id.* at 71,417–18.

37. *Id.* at 71,418.

38. *Id.*

39. *Id.*

40. *E.g.*, Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Kelley v. Bd. of Trs. of Univ. of Ill., 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994). *But see* Pederson v. La. State Univ., 912 F. Supp. 892 (M.D. La. 1996) (no deference), *aff'd in part, rev'd in part*, 201 F.3d 388 (5th Cir. 2000). These cases are discussed *infra*, Parts I.B and II.

41. *E.g.*, George, *supra* note 7, at 654 (stating that proportionality is "the only realistic means of satisfying OCR's definition of equitable accommodation").

equal athletic opportunity, and that the courts have limited institutions' ability to present alternative views of nondiscrimination under Title IX, support this impression. The data from higher education institutions discussed in Part IV illustrates that institutions have been the least successful in meeting this portion of the *Policy Interpretation*.[42]

The best feature of the substantial proportionality measure is its relative specificity. As an enforcement standard, it is easily understood and readily measured. In the past, institutions may have defined "athletic participant" in different ways: for example, excluding "redshirts", who practice with the team and receive athletic aid but do not participate in games, or counting available slots on teams (athletic opportunities) as opposed to students who in fact participate in the sport at the institution (participants). But once regulations or judicial decisions eliminate these variations, "athletic participant" is easy to implement and to apply across institutions. Thus, it is a relatively easy task to compare the number and sex of an institution's athletes with the gender composition of its undergraduate population. Moreover, it is also easy to compare one institution's progress with others.

The proportionality test's main virtue, specificity, is also its most significant drawback and is controversial for several reasons. The most vocal opponents attack the standard as an impermissible quota.[43] Others argue that participation rates address only one aspect of compliance with Title IX and that whether an institution is in violation of Title IX ought to take into account how an institution is complying in other parts of its athletic program.[44] Others complain that the *Policy Interpretation*'s "substantial proportionality" standard is too vague.[45] Still other critics assert that the standard is

42. *See infra* text accompanying notes 384–92.

43. *E.g.*, David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal its Demise*, 47 FLA. L. REV. 741 (1995); Jennifer Lynn Botelho, *The* Cohen *Court's Reading of Title IX: Does It Really Promote a De Facto Quota Scheme?* 33 NEW ENG. L. REV. 743 (1999); Donald C. Mahoney, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943 (1995); Charles Spitz, *Gender Equity In Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?* 21 SETON HALL LEGIS. J. 621 (1997); Darryl Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Makers: The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397 (1996).

44. Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1, 19–20 (1996).

45. Andrew A. Ingrum, Comment, *Civil Rights: Title IX and College Athletics: Is There a Viable Compromise?*, 48 OKLA. L. REV. 755, 769–72 (1995).

impossible to meet[46] or that institutions will only be able to comply at the expense of male athletics or African American athletes.[47]

The argument that proportionality is an improper quota relies upon language in Title IX, the current unpopularity of affirmative action, and a particular interpretation of the proportionality test. Title IX provides that no institution will be required

> to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex . . . in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.[48]

Critics of the proportionality test argue that it mandates statistical balancing in violation of this provision.[49] They argue that this section of Title IX would not allow a statistical balancing of enrollments in such classes as chemistry, political science, or elementary education.[50] Most courts that have considered the quota argument have rejected it, reasoning in part, that proportionate participation rates are only one way of complying with Title IX and are not required.[51] Further, proportionate participation rates are different from quotas in hiring and admission decisions.

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46. Aronberg, *supra* note 43, at 782; Jeffrey Ferrier, *Title IX Leaves Some Athletes Asking, "Can We Play Too?"*, 44 CATH. U. L. REV. 841, 865 (1995).

47. Wilson, *supra* note 43, at 422. I also use the term "critic" to describe the collective voices of coaches, administrators, writers, and other observers who are opposed to Title IX or its application to intercollegiate athletics. One of the most vocal critics is Speaker of the House Dennis Hastert (R. Ill.), who is a former men's wrestling coach and former president of the National Wrestling Coaches Association. He has been an outspoken advocate for men's sports interests and in 1994 led a congressional attack on OCR's three-part test. *Oversight Activities of the Olympic Comm.: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the Senate Comm. of Commerce, Sci., and Transp.*, 103d Cong. 10–12 (1994) (testifying that schools are meeting Title IX by cutting men's sports rather than adding women's sports); *see also* Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 69–74 (1996) (discussing critics).

48. 20 U.S.C. § 1681(b) (1994).

49. *See* Aronberg, *supra* note 43, at 783–84; Botelho, *supra* note 43, at 774; Mahoney, *supra* note 43, at 744.

50. *See* Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 270 (7th Cir. 1994) (argument of male athletes); *see also* testimony of then Representative Hastert in Hearings on Title IX, *infra* note 98, at 14–17.

51. *E.g.*, Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Kelley v. Bd. of Trs. of Univ. of Ill., 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994). *But see* Pederson v. La. State Univ., 912 F. Supp. 892 (M.D. La. 1996), *aff'd in part, rev'd in part*, 201 F.3d 388 (5th Cir. 2000).

The quota argument is misplaced as long as sex-segregated teams are the norm in intercollegiate athletics. Sex-segregated teams mean that institutions start with quotas, or fixed numbers of participants, because institutions decide in advance what teams to sponsor and how many athletes can participate. The quota argument, then, is only an argument about how to divide those opportunities, whether to change from the current two-thirds male to one-third female quota to something more closely approximating equal treatment or gender equality.[52]

The argument that proportionality comes at the cost of hurting male or black athletes is similar to the quota argument. Because women are underrepresented in intercollegiate athletics, attempts to achieve participation rates proportionate to undergraduate enrollments must either expand women's opportunities or decrease men's opportunities. Critics argue that most schools are not adding new resources to their intercollegiate athletic budgets or operations, so most institutions have eliminated men's teams or otherwise limited men's athletic opportunities in order to comply with Title IX.[53] More infuriating to these critics, courts have swept aside Title IX challenges brought by male athletes or institutions concerning this matter.[54] An examination of participation rates and the number of sports offered at institutions does not support the view that most schools eliminate men's teams.[55] Even if it did, one might think that male athletes would do better focusing on how athletic dollars are apportioned within men's athletics. Men should understand that cuts in sports such as gymnastics or wrestling support additional players in football or increased spending in men's basketball, not a women's volleyball team. It is only when athletic programs that offer substantially more athletic opportunities for men than for women choose to support large numbers of participants in football or large expenditures in other sports, such as men's basketball or soccer, that the institutions are faced with cutting men's athletic opportunities. An examination of several institutional strategic plans to achieve gender equity suggests that institutions eliminate men's sports only as a last resort.[56]

Critics of proportionality also attempt to pit gender equity against racial equality, arguing that women's expanded sports

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52. Brake & Catlin, *supra* note 47, at 78.

53. *See* Aronberg, *supra* note 43, at 769; Spitz, *supra* note 43, at 650–54.

54. *See, e.g., Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); Boulahanis v. Bd. of Regents, Ill. State Univ., 198 F.3d 633, 636–39 (7th Cir. 1999); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265 (7th Cir. 1994).

55. *See infra* text accompanying notes 384–92, 407.

56. *See infra* text accompanying notes 366–68.

opportunities are primarily in "country club sports", benefiting white women at the expense of male African American athletes.[57] It is not an uncommon tactic to pit the diverse interests of minority groups against one another, yet expansion of women's athletic opportunity is not the cause of reduced athletic opportunities for men. Uneven distribution of male athletic opportunities is the cause.[58] Even if African American athletes were somehow exempt from gender equity goals, the attack on women is factually unsupportable. African Americans who participate in intercollegiate athletics do so disproportionately in football, basketball, and track;[59] these sports are rarely the ones Title IX opponents claim institutions have eliminated.[60] Even if institutions take seriously calls to limit opportunities in football, it seems more likely that the eliminated 120th bench sitter will also be a "country club" player rather than an African American athlete.[61]

The proportionality rule is also criticized as impossible to meet or too vague to understand. Critics who argue that proportionate participation rates are impossible point out that few institutions are in compliance and that those with "big time" football programs are at an unfair disadvantage.[62] These football programs typically have 120 men on the roster, and because there are no sports that call for as many women, they argue it is unfair to expect proportionality.[63] These institutions will still not be in compliance with the *Policy Interpretation*, the argument goes, even if everything else is equal or proportionate. Nevertheless, proportionality is impossible only if it is equally impossible to change the distribution of male athletic opportunities. Moreover, data on participation rates discussed below does not support this claim of impossibility.[64]

The proportionality measure is too vague, according to this argument, because neither the *Policy Interpretation* nor the courts

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57. Debra E. Blum, *Competing Equities? Some Fear that Steps to Help Female Athletes May Curb Opportunities for Blacks*, CHRON. HIGHER EDUC. May 26, 1995, at A37.

58. *See infra* Part IV.

59. *See, e.g.*, Wilson, *supra* note 43, at 422.

60. *See* Alfred Dennis Mathewson, *Black Women, Gender Equity, and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 260–62 (1996).

61. Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 808–14 (1996).

62. *See* Aronberg, *supra* note 43, at 782; Ferrier, *supra* note 46, at 865.

63. *See generally* Robert C. Farrell, *Title IX or College Football*, 32 HOUS. L. REV. 993, 1015–20 (1995) (arguing that although governmental interests in promoting safety, remedying the effects of past discrimination, and promoting equality of opportunity for women may be legitimate, it may be difficult to prove that these interests are substantially related to gender-based classifications in sport).

64. *See infra* text accompanying notes 388–92, 402–04.

have defined "substantial proportionality."[65] Some observers argue that statistical tests should be applied to determine how much a university can vary from exact proportionality and still remain in compliance.[66] There is no evidence, however, that the *Policy Interpretation*'s use of "substantial" was a term of art; rather it is used as common understanding dictates, to account for the year-to-year fluctuations in undergraduate enrollments and the minor changes in athletic opportunities.[67]

Finally, critics complain about court decisions holding an institution in noncompliance with Title IX solely because of its failure to satisfy the three-part test.[68] According to this argument, the Title IX regulation provides ten factors to use in assessing whether an institution is providing "equal athletic opportunity for members of both sexes."[69] The three-part test measures access, asking only about the accommodation of student interests and abilities, which is but one of these factors. To find a violation of Title IX on the basis of this factor alone, the argument continues, is to ignore the other nine factors.[70] Such a conclusion suggests that strengths in these other factors are irrelevant to offset a weakness in the access factor. The *Policy Interpretation* states that OCR will make a compliance determination based on whether disparities exist "in the institution's program as a whole."[71] It also provides, however, that when "disparities in individual segments of the program . . . are substantial enough in and of themselves to deny equality of athletic opportunity,"[72] a finding of noncompliance will follow. It makes sense to look at all facets of an athletic program, but if fewer women can compete, it is little consolation to those excluded that the ones who do compete are treated fairly.

Thus, each critique of the proportionality rule can be traced to the fundamental notion that men are more interested in sports than women, and therefore men should have the bulk of

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65. Ingrum, *supra* note 45, at 769–71.

66. Walter B. Connolly & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 901–03 (1994); Mary W. Gray, *The Concept of Substantial Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 165, 184–88 (1996).

67. *See* Office for Civil Rights, U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test 2 (Jan. 16, 1996) [hereinafter Policy Clarification].

68. *E.g.*, Snow & Thro, *supra* note 44, at 19–20.

69. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R § 106.41(c)(1999).

70. *See* Snow & Thro, *supra* note 44, at 19–20.

71. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

72. *Id.*

intercollegiate opportunities.[73] Any compliance rule that does not take into account women's lesser interest is bound to be seen as a quota or to require reverse discrimination against men. The argument that blacks will be disproportionately harmed raises the stakes. Opponents of the proportionality rule are so certain of the lesser interest of women that any argument premised on equal participation is untenable.

3. Lack of Interest—The argument that women lack interest in sports is more directly relevant to the third prong of the "effective accommodation" test of the *Policy Interpretation.* That is, institutions can show that their present athletic program fully and effectively accommodates the interests and abilities of the members of the underrepresented sex, without showing substantial proportionality or a history of program expansion. The meaning and scope of this third prong is also subject to controversy.[74]

Litigants and commentators have argued that, under the third prong, institutions may be in compliance with Title IX and its regulation if they meet the interests of women to the same extent that they meet the interests of men.[75] In assessing equal treatment under the *Policy Interpretation,* these litigants and commentators argue for the seemingly common sense notion that because athletic programs do not meet the interests and abilities of all men, they need not meet the interests and abilities of all women.[76] To require otherwise, they argue, is reverse discrimination against men and turns the Title IX nondiscrimination statute into an affirmative action requirement for women.[77] Under this view, the appropriate measure would be to compare athletes' participation opportunities with the relative interest of male and female students, as measured by the institution, rather than to use the

73. *See* Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View,* 62 BROOK. L. REV. 1039, 1041–42, 1071–72 (arguing that fewer women than men take advantage of existing collegiate athletic opportunities and that a more fair proportionality test would be based on high school participation rates).

74. A minor controversy arose in terms of prong two. The OCR has made it clear that expanding women's athletic opportunities must be a continuing effort and that the second prong did not protect institutions that added women's team in the late seventies and early eighties but have done nothing since then. Policy Clarification, *supra* note 67, at 4–6 (1996).

75. *See, e.g.,* Neal v. Bd. of Trs. of Cal State Univs., 198 F.3d 763 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996); Connolly & Adelman, *supra* note 66, at 880–93.

76. *See, e.g., Neal,* 198 F.3d at 767; *Cohen,* 101 F.3d at 174–76; Connolly & Adelman, *supra* note 66, at 880–82.

77. *See, e.g., Neal,* 198 F.3d at 771–72; *Cohen,* 101 F.3d at 169–70; Connolly & Adelman, *supra* note 66, at 889.

percentage of each sex in the undergraduate enrollment as a proxy for such interest.[78]

Courts have rejected this interpretation of Title IX, giving total deference to the government agency, its regulation, and its *Policy Interpretation*.[79] After deciding the *Policy Interpretation* is entitled to great deference,[80] courts read the third prong to require institutions to show that the interest and abilities of the members of the underrepresented sex have been "*fully* and effectively accommodated by the present program."[81] It is very difficult to meet this requirement and cut women's teams when women remain underrepresented in intercollegiate athletics. An existing team shows that there is interest, competitive opportunities in the area, and capable athletes at the university.

The other difficulty with the institutions' version of the accommodation requirement is the inherent difficulty of measuring student athletic interest and ability. First, there is the question of how to measure interest. The OCR does not prescribe specific survey instruments or scientific validations of assessments.[82] Instead, it gives the institutions discretion in how to determine student interest. It does, however, warn institutions that OCR expects institutional assessments to reach a wide audience and to be open-ended regarding the sports in which students can express interest.[83] Second, there is the question of whom to survey. Government regulations suggest that institutions should survey their current student populations, but students who compete in intercollegiate athletics are recruited especially to do so; if their athletic opportunities were not available at the institution, they might not be there. That is, institutions create interest in their programs; intercollegiate football and basketball programs do not simply emerge from the student bodies but rather are the products of very careful administrative design. In contrast, current student

78. Actually this suggestion contemplates a change to both sides of the ratio. The text discusses the change in the denominator; critics would also expand the numerator to include those opportunities that the coaches are willing to support, not merely those individuals who make the team roster. *See, e.g.*, Cohen v. Brown Univ., 879 F. Supp. 185, 203 (D.R.I. 1995).

79. *See, e.g.*, *Neal*, 198 F.3d at 767–69; Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996).

80. Cohen v. Brown Univ., 991 F.2d 888, 899 (1st Cir. 1993).

81. *Id.* at 902 (emphasis added). This "full" requirement is in the Policy Interpretation but not in the statute or regulation. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

82. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,417; Policy Clarification, *supra* note 67, at 8.

83. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,417; Policy Clarification, *supra* note 67, at 8.

groups, such as existing club sports or intramural teams, could provide information about other student interest and ability. Student surveys alone, however, are unlikely to support an institution's decision that women are uninterested in athletic opportunities because they are poor measures of interest. Moreover, it is difficult to identify the statistical test or validate the survey instrument that would be sufficiently precise to measure what the institutions want to argue: that they meet the same proportion of student interest and ability for women that they do for men.[84]

Most problematic is the notion that institutions would have an accurate picture of women's interest in athletic competition with these attempts at measuring interest. Research in other areas strongly suggests that interest is not biologically determined but rather is learned or cultivated.[85] In a notorious employment discrimination case,[86] the Equal Employment Opportunity Commission (EEOC) sued Sears, Roebuck & Company under Title VII of the 1964 Civil Rights Act[87] alleging that Sears engaged in sex discrimination in hiring and promotion into commission sales jobs, reserving these jobs mostly for men while relegating women to much lower-paying noncommission sales jobs. Although the EEOC's evidence showed a long-standing pattern of sex segregation in Sears's sales force, the district court refused to attribute this pattern to sex discrimination.[88] The court reasoned that the EEOC's evidence was based on the "faulty" assumption that female sales applicants were as "interested" in commission sales jobs as male applicants.[89] The court's view of women's lack of interest in commission sales rested on its conventional images of women as feminine and nurturing and unsuited for the "rigors" of male-dominated commission selling.[90] Key to the current discussion is the court's conclusion that Sears was not responsible for its segre-

84. *See* Brake & Catlin, *supra* note 47, at 78–82; Shook, *supra* note 61, at 799–805; John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 232–41 (1996).

85. *See* JERRY JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 16–20 (1989) (demonstrating that the types of work typically considered "male" or "female" varies dramatically across different cultures). *See generally* SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES (Barbara Reskin ed., 1984).

86. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1278 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

87. 42 U.S.C. §§ 2000e-2 to -16 (1994) (prohibiting discrimination in employment on the basis of race, gender, religion, or national origin). The EEOC, the federal administrative agency that interprets Title VII, is authorized to bring enforcement actions in federal district courts. *Id.* § 2000e-5(F)(1).

88. *Sears*, 628 F. Supp. at 1352–53.

89. *Id.* at 1305.

90. *See id.* at 1304–08, 1324–25.

gated sales force; it merely honored the preexisting preference of women.[91]

In Title VII cases, employers raise the lack of interest argument to rebut an inference of discrimination based on plaintiffs' statistical evidence showing women are underrepresented in the employer's workforce.[92] That is, employers acknowledge that women are underrepresented and argue that they have tried to attract women, but women remain uninterested primarily because the so-called "men's jobs" are too demanding. Courts that endorse this argument by finding the employer not liable "permit and encourage employers to continue to organize work and work relations in ways that disempower women workers from claiming the more highly valued nontraditional jobs the law has promised them."[93] Observers argue that employers do not simply erect barriers to already formed preferences; they create the workplace structures and relations out of which those preferences arise.[94]

Courts in more recent Title IX cases distinguish these earlier employment cases.[95] They understand that women's interest in sports and intercollegiate athletics is determined, in part, by what is already available at the relevant institutions. Are there teams? If so, is there an opportunity for varsity competition? Are these teams treated as serious endeavors in the same way that men's sports teams are? Recent decisions have echoed OCR's regulation and guidelines by placing the burden on institutions to change the athletic structures and relations out of which preferences arise.[96] Conversely, if an institution can show good faith efforts to build a women's athletic program but does not bring its participation rate

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91. *Id.*

92. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1840 (1990) (indicating that nearly half of the courts accept this argument).

93. *Id.* I use *Sears* to describe the lack of interest argument because it has received widespread media attention. *See also* Joan Williams, *Towards a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 98–101 (1998) (arguing that a woman's "interest" in certain jobs is heavily influenced by her family workload).

94. *See* Schultz, *supra* note 92, at 1757; Williams, *supra* note 93, at 89–93.

95. *See* Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 768–69 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 176–78 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824,831–32 (10th Cir. 1993); Kelley v. Bd. of Trs. of Univ. of Ill., 832 F. Supp. 237, 242 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994). *But see* Pederson v. La. State Univ., 912 F. Supp. 892, 914 (M.D. La. 1996), *aff'd in part, rev'd in part*, 201 F.3d 388 (5th Cir. 2000) (giving no deference to the proportionality test "inferred" from language in the Policy Interpretation").

96. *See Neal*, 198 F.3d at 771; *Cohen*, 101 F.3d at 179–80; *Roberts*, 998 F.2d at 833–34; *Kelley*, 832 F. Supp. at 241. *But see Pederson*, 912 F. Supp. at 914.

to the level of its undergraduate enrollment, then the lack of interest argument is a defense, as in the earlier employment cases.[97]

4. Policy Clarification—In 1996, in response to these controversies and continuing pressure from institutions and coaches of male teams, OCR issued a *Policy Clarification* on the "three-part test" to assess an institution's effective accommodation of students' athletic interests and abilities.[98] The *Policy Clarification* reiterates the *Policy Interpretation's* three-part test and its position that an institution must meet only one part of the test.[99] The *Policy Clarification* gives specific examples of how an institution might comply under each prong of the test, especially under the second and third prong. For example, the clarification specifies certain factors that it will consider as evidence indicating a history of program expansion under prong two: an institution's record of adding women's teams; an institution's record of increasing the number of female participants; and an institution's affirmative response to requests by students and others to add or upgrade sports.[100] It also emphasizes that an institution's current practice is very relevant and makes clear that simply eliminating a women's team is not itself a violation of Title IX.[101] In addition, the *Policy Clarification* emphasizes that cutting or capping men's teams will not help an institution comply with part two or part three of the test because "these tests measure an institution's positive ongoing response to the interests and abilities of the *underrepresented* sex."[102]

The *Policy Clarification* also specifies the factors OCR will consider under the third prong in determining whether an institution has fully and effectively accommodated the interests and abilities of women students. For example, it makes clear that in determining whether there is an unmet interest to support an intercollegiate team, OCR will look at requests by students, thriving sports teams that are not varsity level, and the results of

97. *See* Weistart, *supra* note 84, at 238–40.

98. Policy Clarification, *supra* note 67. The House of Representatives held hearings on Title IX in 1995. *Hearings on Title IX of the Educational Amendments of 1972: Hearings Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning of the H.R. Comm. on Econ. and Educ. Opportunities*, 104th Cong. (1995). Representatives of football coaches, *id.* at 200, 220, 385, men's minor sports groups, *id.* at 78, 101, and two universities found in violation of Title IX, *id.* at 78, 101, gave testimony expressing their grievances about Title IX and the way it was enforced by OCR and the courts. No proposed amendments to Title IX resulted from the hearings, but some congressmen wrote to OCR to ask that it clarify its three-part test.

99. Policy Clarification, *supra* note 67, at 8.

100. *Id.*

101. *Id.*

102. Policy Clarification, *supra* note 67, at 3 (emphasis added). In contrast, capping or cutting men's teams can be used to comply with proportionality, the first part of the test.

surveys.[103] It provides similar detail about the factors to examine in deciding whether sufficient ability exists to sustain an intercollegiate team and whether there is a reasonable expectation of competition for the team. An institution's active encouragement in the development of the athletic opportunities is key; it makes clear that when an institution eliminates a viable women's team, the institution must be able to provide strong evidence that interest, ability, or competition no longer exists.[104] In general, the *Policy Clarification* does what it sets out to do—clarify. It disappoints, however, those who looked to this newest word from OCR as a chance to reduce the focus on, or even eliminate, the three-part test to assess institutions' effective accommodation of student athlete interests and abilities.

B. The Cases

This Section analyzes two recent court decisions interpreting Title IX as applied to intercollegiate athletics. The first is *Cohen v. Brown University.*[105] Every circuit court to have reviewed a claim of discrimination in intercollegiate athletics under Title IX has followed *Cohen's* analysis of the regulation and *Policy Interpretation.*[106] The district court opinion in *Pederson v. Louisiana State University,*[107] analyzed second, provides the rare counterpoint. This discussion details the arguments of both the proponents and the critics of Title IX and illustrates how the *Policy Interpretation*'s three-part test applies in different situations.

The first of the athletic cases was *Cohen v. Brown University.*[108] Representing a class of current women athletes, plaintiffs

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103. *Id.* at 10.

104. *Id.*

105. 101 F.3d 155 (1st Cir. 1996).

106. Roberts v. Colo. State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993) (discussing attempt to drop softball and baseball; finding ten percent disparity is too great), *aff'd in part, rev'd in part by,* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828–30 (10th Cir. 1993), *cert. denied,* 510 U.S. 1004 (1993); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993), *mot. to modify denied,* 7 F.3d 332 (3d Cir. 1993) (discussing attempt to drop two men's and two women's sports).

Similarly, courts find no violation of Title IX when a university drops only men's sports, if there is a substantial disproportionality. *See, e.g.,* Neal v. Bd of Trs. of Cal. State Univs., 198 F.3d 763, 765 (9th Cir. 1999); Kelley v. Bd. of Trs. of Univ. of Ill., 832 F. Supp. 237, 244 (C.D. Ill. 1993), *aff'd,* 35 F.3d 265 (7th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995).

107. 912 F. Supp. 892, 914 (M.D. La. 1996), *aff'd in part, rev'd in part,* 201 F.3d 388 (5th Cir. 2000).

108. 809 F. Supp. 978, 980 (D.R.I. 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993), 879 F. Supp. 185 (D.R.I. 1995), 101 F.3d 155 (1st Cir. 1996), *cert. denied,* 520 U.S. 1186 (1997).

challenged Brown University's decision to drop two women's sports. In 1991, Brown announced that as a belt-tightening measure it would drop four sports from its varsity roster: women's volleyball and gymnastics as well as men's golf and water polo.[109] Brown cut off the financial subsidies and support services routinely available to varsity athletes, saving almost $78,000.[110] Abolishing the women's teams saved more than $62,000, but did not affect the overall athletic participation rate for either gender; women continued to have about thirty-seven percent of the athletic opportunities and men about sixty-three percent as compared to Brown's student population of fifty-two percent men and forty-eight percent women.[111] Plaintiffs claimed that Brown's athletic arrangements violated Title IX's ban on gender discrimination.[112]

In reviewing the district court's preliminary injunction, the court of appeals first held that OCR's Title IX athletic regulation was entitled to "appreciable deference."[113] The court noted that the degree of deference is particularly high "because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX."[114] In addition, the court concluded that the 1979 Policy Interpretation was entitled to "substantial deference" because it was a "considered interpretation of the regulation."[115] The court reviewed the Policy Interpretation, outlined the three areas of compliance (financial aid, program benefits, and accommodation of student interests and abilities), and agreed that an institution could be in violation of Title IX even if it met the "financial aid" and "program benefits" standards.[116]

Turning its consideration to the contested area of compliance—effective accommodation of students' athletic interests and abilities—the court repeated the *Policy Interpretation*'s three-part test.[117] According to the court, the first prong, proportionate participation rates, provides "a safe harbor for those institutions that have distributed athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies."[118] The second prong protects an institution from having to "leap to

109. *Id.* at 981.
110. *Id.*
111. *Cohen*, 991 F.2d at 892.
112. *Id.* at 893.
113. *Id.* at 895.
114. *Id.*
115. *Id.* at 896–97.
116. *Id.* at 897.
117. *Id.*
118. *Id.*

complete gender parity in a single bound"[119] as long as it is continually expanding athletic opportunities for the underrepresented sex and continues this approach as the interests and ability levels in its student body rise.[120] Most schools, noted the court, attempt to comply with Title IX by meeting the third prong of the accommodation test, that is, by satisfying the interests and abilities of the underrepresented gender.[121] The court emphasized, however, that the third prong sets a high standard; it demands not merely some accommodation, but "full and effective" accommodation of women athletes' interests and abilities.[122]

Brown argued that this interpretation of the third prong is inconsistent with Title IX.[123] Brown urged that a more reasonable reading of the statute allows an institution to meet the third prong as long as it accommodates the interests and abilities of female students to the same extent that it meets male students' interests and abilities.[124] The court of appeals rejected this apparently common sense reading of the Title IX regulation, reasoning that by allowing an institution to meet students' interests incompletely, Brown read the "full" out of the duty to accommodate "fully and effectively."[125] The court stated that Brown's alternative interpretation of Title IX was wrong both as a matter of law and as a matter of policy.[126] Because the agency's interpretation rests on a "plausible" reading of Title IX, the court is obligated to enforce it.[127] The court concluded that the regulation does not conflict with Title IX and that the three-part test taken as a whole is a reasonable way to implement the statute.[128] Brown's argument is bad policy, according to the court, because it would make it more difficult for institutions to know whether they were in compliance with Title IX.[129] It would also diminish the responsibility to "take into account the nationally increasing levels of women's interests and abilities"[130] and aggravate the quantification problems that are implicit in this proffered reading of the third prong.[131] Finally,

119. *Id.* at 898.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 899.
124. *Id.* at 889.
125. *Id.*
126. *Id.*
127. *Id.* at 900.
128. *Id.*
129. *Id.*
130. *Id.* (quoting 44 Fed. Reg. at 71,417).
131. *Id.*

the court summarily rejected Brown's constitutional challenges that OCR's reading of the statute violated the equal protection component of the Fifth Amendment or that it constituted unlawful affirmative action.[132]

Because the degree of deference to the agency's interpretation of Title IX was critical to the outcome of the case, Brown University again contested that issue at the subsequent trial in federal district court.[133] Brown argued that the agency exceeded its rulemaking authority and that the documents were "interpretative" rather than "legislative" because the rulemaking authority of OCR was limited to writing rules about "the nature of particular sports."[134] Rejecting this argument, the district court noted that the congressional directive to "include reasonable provisions considering the nature of particular sports"[135] did not limit the scope of the delegation; it merely compelled the agency to include such provisions in its broader regulatory framework.[136] The defendants next contended that the *Policy Interpretation* did not have binding effect because it was not approved by the President, as the statute required of the original regulation.[137] The district court rejected this argument, concluding that the *Policy Interpretation* was not a "regulation" as contemplated by the statute, but rather an agency's interpretation of its own regulations; while not given the force of law, it was entitled to substantial deference.[138] The court concluded that the *Policy Interpretation* was binding unless it was clearly erroneous or inconsistent with the statute.[139] Finally, it rejected Brown's argument that the existence of football excused the lack of proportionality, which, according to Brown, was required by the government's responsibility to take into account "the nature of particular sports."[140]

Brown University raised a number of other issues challenging the premises as well as the substantive provisions of the *Policy Inter-*

132. *Id.* at 900–01. Brown University also questioned the district court's allocation of the burden of proof. *Id.* at 901. The court of appeals rejected Brown's argument that Title VII's analytic model of burden setting and shifting should be incorporated into Title IX litigation. *Id.*

133. *Cohen*, 879 F. Supp. 185, 197–98 (D.R.I. 1995).

134. *Id.* at 198.

135. *Id.* at 199 (citation omitted).

136. *Id.*

137. 20 U.S.C. § 1682 (2000) (stating that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President").

138. *Cohen*, 879 F. Supp. at 198.

139. *Id.* Similarly, the court of appeals rejected the claim that the Policy Interpretation required impermissible affirmative action. Cohen v. Brown Univ., 991 F.2d 888, 901 (1st Cir. 1993).

140. *Cohen*, 879 F. Supp. at 199.

pretation during its second trial in federal district court. First, the University argued that "substantial proportionality" should be liberally interpreted in favor of institutions because "the gender composition of the athletic program is both unpredictable and out of Brown's control."[141] The court rejected this argument, concluding that "Brown does predetermine the gender balance of its athletic program through the selection of sports its offers . . ., the size of the teams it maintains . . ., the quality and number of coaches it hires, and the recruiting and admissions practices it implements."[142] Because recruits constitute the bulk of athletes on nearly all Brown's varsity teams, the court reasoned, the University should not have been surprised by the gender mix of interested athletes on campus.[143]

Second, the University challenged the court's definition of "participation opportunities," arguing for an expanded definition.[144] The district court defined "participant opportunities" as actual participants on intercollegiate teams.[145] In contrast, the University argued that participation opportunity should be measured by counting each team's filled and unfilled athletic slots. For example, Brown argued that participation opportunities should include the additional athletic slots on women's teams that coaches testified they were able to support.[146] The court rejected this argument because Brown "predetermines" the approximate number of varsity positions available to men and women; thus, according to the court, the concept of "unfilled but available" athletic slots does not comport with reality.[147] The court also rejected Brown's argument that the number of slots on a women's team should be the same as the number on the companion men's team. Declining to adopt what it called a "male model", the court noted that while sports for men and women may share the same name, they may not require the same number of team members in order to compete effectively.[148]

Third, Brown recast its "relative interest" argument, raised under the third prong to redefine "participation opportunity", as crucial to prong one. Brown contended that where the student

141. *Id.* at 202.
142. *Id.*
143. *Id.*
144. *Id.* at 202.
145. *Id.*
146. *Id.* at 203.
147. *Id.* at 203 n.36. It should be noted, however, that women athletes' behavior does suggest that women are less interested or willing to be only a bench-sitter so that the likelihood that an institution can meet its squad sizes may differ along gender lines.
148. *Cohen*, 879 F. Supp. at 204.

body is composed of equal numbers of men and women, equality means offering the chance to participate in athletics to an equal number of men and women.[149] It argued that if students were offered a hypothetical opportunity to participate, the students would actually participate in varsity athletics in accordance with the relative interest of their respective genders.[150] "Thus, where the gender ratio of a university's interested student population is substantially proportionate to the gender ratio of its athletic program, it may be assumed that men and women ... were 'offered' an equal 'opportunity' to participate."[151] The court rejected Brown's attempt to shift to the plaintiffs the burden of proving the very proposition the court of appeals had already dismissed.[152] In this recast form, plaintiffs would have to undertake the complicated assessment of "interested" students before comparing that population with the population of student athletes. Such assessment would "be meaningless since it is an impossible task to quantify latent and changing interests."[153] After carefully considering various possible survey pools, the court was unwilling to impose such a heavy burden on the plaintiffs where it was "unclear what population should be surveyed to assess the interest of the 'qualified applicant pool,' even if it were possible to do so."[154]

In defining discrimination under Title IX, Brown argued that the relevant comparison was between the interested potential varsity athlete pool and the make-up of Brown's athletic program, rather than the *Policy Interpretation*'s comparison between student enrollment and varsity athletes.[155] The defendant's comparison borrowed from employment cases under Title VII, where the Supreme Court has held that the relevant comparison was between the qualified applicant pool and the workplace demographics, rather than between the population of the United States and the workforce.[156] The district court rejected this analogy, calling the comparison to Title VII "inapposite."[157] According to the court, Title VII sought to determine whether gender-neutral job openings have been filled without regard to gender.[158] In contrast, Title IX was designed to address the reality that sports teams,

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 205 n.41.
153. *Id.* at 205.
154. *Id.* at 206.
155. *Id.* at 206–07.
156. *E.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977).
157. *Cohen*, 879 F. Supp. at 205.
158. *Id.*

unlike the vast majority of jobs, had official gender requirements.[159] Thus, Title IX established a legal presumption that discrimination exists if the university does not provide participation opportunities to men and women in substantial proportionality to their respective student enrollments, unless the university met one of the two exonerating situations set forth in prongs two or three of the effective accommodation requirement.[160]

On appeal, Brown University again challenged the applicability of Title IX on constitutional and statutory grounds, and the court of appeals again affirmed.[161] Brown continued to press both its "relative interests" approach and its view that the district court's decision imposed upon universities the obligation to engage in preferential treatment by requiring quotas in excess of women's relative interests and abilities.[162] The court of appeals declined the university's invitation to undertake plenary review of the issues decided in the previous appeal, but the panel did review the

159. *Id.*

160. *Id.*; *see infra* text accompanying notes 211–32. The court also considered whether Brown was in compliance with Title IX under prong two or three. *Cohen*, 879 F. Supp. at 211. Because Brown had not maintained a continuing practice of intercollegiate program expansion for women, the underrepresented sex at Brown, prong two was summarily dismissed. *Id.* Indeed, the percentage of women participating in varsity athletics at Brown had remained remarkably steady. *Id.* Under prong three, Brown pressed its original argument that it could accommodate less than all of the interested and able women, if it accommodated proportionately less than all of the interested and able men. *Id.* at 208. Brown introduced a great deal of evidence in support of its position: Brown conducted a survey on campus, analyzed students' college applications and assembled a variety of national studies in an attempt to quantify the relative interest of men and women in athletics. *Id.* at 209–10. This argument did not persuade the court, however, because Brown still ignored the Policy Interpretation's directive that an institution determine athletic interests and abilities of its students in such a way as to take into account the nationally increasing levels of women's interests and abilities and to avoid disadvantaging members of an underrepresented sex. *Id.* at 210. Moreover, Brown's evidentiary attempts showed that no one measure and no identifiable population adequately establish relative interest, thus effectively demonstrating how Brown's interpretation of prong three would impose an insurmountable task on Title IX plaintiffs.

Brown also argued that because of the court's interpretation of prong three, institutions were in effect required to have women athletes in proportion to their representation in the student body. *Id.* The court acknowledged that its interpretation of prong three required that the unmet interests and abilities of the underrepresented sex be accommodated to the fullest extent until the substantial proportionality of prong one is achieved, but this effect was short of mandating proportionality in all cases. *Id.* Brown might be required to achieve substantial proportionality given the depth of athletic talent at Brown; other universities, however, might point to the absence of such athletes to justify an athletic program that does not offer substantial proportionality. *Id.* Noting that Brown could achieve compliance with Title IX in a number of ways, the court then left it to Brown's discretion to decide how to balance its programs in order to provide equal opportunities to its female and male athletes. *Id.*

161. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

162. *Id.* at 174.

constitutionality of the district court's order requiring Brown to comply with Title IX by accommodating fully and effectively the athletic interests and abilities of its female students.[163] Reiterating the necessity of counting and comparing athletic opportunities with gender explicitly in mind, the court of appeals held that "the district court's remedial order passes constitutional muster."[164]

In contrast to the deference shown by the *Cohen* courts, the district court in *Pederson v. Louisiana State University*[165] was hostile and antagonistic to the Title IX regulation and interpretations. *Pederson* was also different from *Cohen* because the plaintiffs were female students at Louisiana State University (LSU) who had never participated in varsity athletics and who wanted LSU to create varsity athletic opportunities for them.[166] A Title IX violation is more obvious in cases like *Cohen*, involving institutions that eliminate existing varsity teams.[167] In those situations there is known interest and ability to field a competitive team, and the current varsity athletes are obvious plaintiffs. Cases like *Pederson*, however, more closely represent those situations that the *Policy Interpretation*'s three-part test had in mind—an institution's current students with interest and ability to compete in varsity athletics.

In *Pederson*, female students at LSU sought a declaratory judgment that LSU violated Title IX by failing to accommodate plaintiffs' interests and abilities in intercollegiate varsity soccer and softball.[168] Initially, LSU decided to add softball and women's soccer in the 1995 season but later agreed with the Southeastern Conference to delay implementation of softball until fall 1996.[169] The court found that LSU had not in fact implemented any of these plans.[170]

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163. *Id.* at 162.

164. *Id.* at 184 (applying intermediate scrutiny test). The court did reject the district court's specific remedy. During the remedy stage the district court substituted its judgment of how to comply with Title IX for the judgment of the University because the court determined that the University was not proceeding in good faith. *Id.* at 185–87. The court of appeals agreed that the University had not offered its remedy in good faith but reversed the district court's decision on this point nonetheless. *Id.* at 188.

Chief Judge Torruella dissented, essentially accepting the constitutional arguments made by Brown University. *Id.* In addition the dissent suggests that because of the specific treatment of contact sports under the Title IX regulation, contact sports should be excluded in determining participation opportunities. *Id.* at 192–93. For a recent article supporting the analysis of the dissent, see Botelho, *supra* note 43, at 772–95.

165. 912 F. Supp. 892, 913–14 (M.D. La. 1996).

166. *Id.* at 911.

167. The 1995 Policy Clarification makes this point explicitly. Policy Clarification, *supra* note 67, at 7.

168. 912 F. Supp. at 897.

169. *Id.* at 901.

170. *Id.* at 916–17.

Plaintiffs asserted a claim for unequal treatment of female athletes, including unequal pay to coaches, lesser quality facilities, and other related grievances, but the court dismissed the claim because none of the plaintiffs was a varsity athlete at LSU and thus each lacked standing to pursue the "equal treatment" claim.[171] The plaintiffs also asserted a claim for "equal access" or accommodation, alleging that LSU failed to effectively accommodate plaintiffs' interests and ability to participate in intercollegiate athletics.[172] Plaintiffs argued that LSU provided greater athletic opportunity to its male students than its female students at a time when sufficient interest and ability existed within its female population to justify increasing women's sports opportunities.[173] The evidence showed that LSU's student population during the relevant period was fifty-one percent male and forty-nine percent female, and its athletic participation for the same period was approximately seventy-one percent male and twenty-nine percent female.[174]

The court concluded that, as to softball, the plaintiffs showed that sufficient interest and ability existed on the LSU campus to field a successful Division I women's softball team in 1979.[175] Because LSU provided greater opportunity to males, specifically that it provided opportunity to participate in varsity baseball to males, the court ruled plaintiffs had established sufficient individualized injury and standing to bring a Title IX action against LSU.[176]

In contrast, as to soccer, the district court concluded that the plaintiffs did not have standing to pursue their claim because there was no male varsity Division I soccer team at LSU.[177] According to the court, even though LSU provided greater athletic opportunity to its male than female students, plaintiffs did not have standing to challenge the lack of women's soccer because LSU provided the same opportunity for soccer participation to its male and female students as a club sport.[178] The court reasoned that LSU's alleged violation of Title IX—not providing additional athletic opportunity to its female students—did not directly affect these soccer plaintiffs, because they did not have the talent to participate in any sport other than soccer at the club level.[179]

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171. *Id.* at 902–04.
172. *Id.* at 904–05.
173. *Id.* at 905–07.
174. *Id.* at 915.
175. *Id.*
176. *Id.* at 906.
177. *Id.* at 908.
178. *Id.* at 907.
179. *Id.*

The Fifth Circuit Court of Appeals affirmed in part and reversed in part.[180] The court affirmed the district court's holding that LSU violated Title IX by failing to accommodate effectively the interests and abilities of women students.[181] The court did not question the district court's analysis of the substance of the Title IX violation or chide the lower court for its refusal to defer to the Title IX regulation or its *Policy Interpretation.* The appellate court, however, did reverse the district court's decision that the soccer plaintiffs lacked standing.[182]

In *Pederson,* the district court noted the lack of guidance from the circuit and struggled to find an appropriate analytical framework.[183] Noting the regulation and the *Policy Clarification,* the court stated that the latter was not signed by the President or endorsed by Congress and was also "susceptible, in part, to an interpretation distinctly at odds with the statutory language."[184] Both parties agreed that the first prong (proportionality) of the *Policy Interpretation*'s three-part test, provided a safe harbor. The district court, however, rejected "most emphatically" this notion of a safe harbor.[185] Acknowledging the other judicial decisions that deferred to the *Policy Interpretation* and its proportionality test, the *Pederson* court said that these decisions were not binding because none came from the Fifth Circuit.[186] Additionally, the court found those decisions unpersuasive because they relied on the erroneous assumption that interest and ability to participate in sports was equal between all men and women on campus.[187] Echoing a version of

180. Pederson v. La. State Univ., 201 F.3d 388, 414 (5th Cir. 2000).

181. *Id.* at 392.

182. *Id.* at 398. The court of appeals concluded that the soccer plaintiffs did have standing to bring an effective accommodation claim and ordered the district court on remand to determine the merits of their claim. *Id.* at 400.

In addition, the court of appeals vacated the district court's order decertifying a class and ordered the court to reconsider final class certification in light of the appellate opinion and all other class certification considerations. *Id.* at 397.

The court of appeals also reversed the district court's judgment that LSU did not intentionally discriminate against women in the provision of athletics. *Id.* at 410. The district court held that the violations were a result of "arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics," but not intentional. *Pederson,* 912 F. Supp. at 918. The court of appeals agreed with the lower court's characterization but concluded that LSU "persisted in a systematic, intentional, differential treatment of women." *Pederson,* 201 F.3d at 412.

The appellate court affirmed the district court's decision that the plaintiffs lacked standing to challenge the alleged unequal treatment of varsity athletes at LSU because no named plaintiff was a member of a varsity team. *Id.* at 400.

183. *Pederson,* 201 F.3d at 409.

184. *Pederson,* 912 F. Supp. at 911–12.

185. *Id.* at 913.

186. *Id.*

187. *Id.*

the defendant's argument in *Cohen*, the district court in *Pederson* reasoned that it was more logical to assume that interest in participation and levels of ability will vary from campus to campus and region to region as well as over time.[188]

In response to other courts' deference to the Title IX regulation and OCR's interpretations, the district court in *Pederson* argued that the proportionality language was only "*inferred* from language in the *Policy Interpretation* and ignore[s] other language within the *Policy Interpretation* and the statute which argue[s] against such an inference."[189] The court concluded that the statutory language mandating that Title IX not be interpreted to require preferential or disparate treatment to members of one sex[190] prohibited the numerical proportionality argued for by both defendants and plaintiffs.[191] Instead of the *Policy Interpretation* offering a safe harbor, the court found that a proper reading of it allows for consideration of all factors listed therein to determine whether the university has provided equal opportunity and levels of competition for males and females.[192]

According to the district court, "the pivotal element of the analysis in this case [was] the question of effective accommodation of interests and abilities."[193] The most important part of this analysis was LSU's knowledge of the interest and abilities of its female students. Without this information, neither LSU nor the court could evaluate whether the institution is effectively accommodating those interests and abilities. Thus, the district court in *Pederson* echoed the defendant institution in *Cohen*, arguing that measuring interest among *current* students was crucial to complying with Title IX. This notion is problematic for the reasons given in *Cohen*. First, varsity athletes are typically recruited and are not simply "found" in the student body.[194] Second, determining interest is extremely difficult.[195] In contrast to the defendant institution in *Cohen*, however, the court in *Pederson* did not use this interest analysis as a way to explain LSU's lack of progress or as a way to change the ratio of

188. *Id.* at 913–14.

189. *Id.* at 914.

190. *See supra* notes 48–52 and accompanying text.

191. *Pederson*, 912 F. Supp. at 914.

192. The district court in *Neal v. Board of Trustees of California State Universities* relied on the *Pederson* district court opinion to conclude that Title IX's regulation and its Policy Interpretation violated the statute in a challenge to a university decision to reduce the spots on the men's wrestling team. 198 F.3d 763, 766 (9th Cir. 1999). The Ninth Circuit reversed. *Id.* at 765.

193. *Pederson*, 912 F. Supp. at 915.

194. *See supra* text accompanying notes 82–84.

195. *See id.*

interested students to varsity athletes. Rather, the court in *Pederson* considered the fact that LSU had never attempted to measure student interest as evidence that "LSU is and has been ignorant of the interests and abilities of its student population."[196]

In addition to the court's rejection of the *Policy Interpretation*'s proportionality rule, the district court decision is interesting for another reason. In deciding whether LSU effectively accommodated student interests and abilities, the court compared the treatment of potential female student athletes to the treatment of male student athletes in the same sport.[197] For example, the district court suggested that the soccer plaintiffs could not have succeeded in showing a violation of Title IX because LSU did not sponsor a men's varsity soccer team.[198] In contrast, the softball plaintiffs were successful in showing a Title IX violation, at least in part because LSU sponsored a varsity baseball team.[199] Nothing in the regulation or *Policy Interpretation* suggests this sport-to-sport comparison. Although commentators to the proposed *Policy Interpretation* suggested that equality of opportunity should be measured by a "sport-specific" comparison,[200] the Department's response accompanying the final *Policy Interpretation* noted that there was no requirement of identical programs for men and women.[201] Such a reading of the statute would overlook two key elements of Title IX policy. First, a requirement that sports for the members of one sex be available or developed solely on the basis of their existence for

196. *Pederson*, 912 F. Supp. at 915. This factor is important in determining whether LSU is in violation of Title IX, but the court's discussion suggests that it is confused about how the analytical framework set out in the Policy Interpretation fits together. Everyone in the case agrees that the key question is effective accommodation and the court quotes from the "overall compliance" section of the Policy Interpretation. *Id.* at 909. The court rejects, however, any part of the Policy Interpretation that measures the specifics of effective accommodation. *Id.* For other criticism of the court's analysis, see Weistart, *supra* note 84, at 240 n.168.

LSU could not avoid a finding of noncompliance by relying on other provisions of the Policy Interpretation. The court specifically held that not only did LSU not have a history and continuing practice of expanding its women's athletic program, it had a practice not to expand women's athletics until it became absolutely necessary to do so. *Pederson*, 912 F. Supp. at 916. Even though LSU had made a verbal commitment to add two women's sports, the court found that LSU had so far failed to live up to its commitment. *Id.* According to the court, LSU's decision to add two women's sports was not its own; rather it was a Southeastern Conference and National Collegiate Athletic Association decision, one that LSU had actively lobbied against. *Id.* at 916–17.

197. *Pederson*, 912 F. Supp. at 915–16.

198. *Id.* at 907.

199. *Id.* at 915–16.

200. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,422 (Dec. 11, 1979). Institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of these sports.

201. *Id.*

members of the other sex would conflict with the nondiscrimination provision of the regulation where the interests and abilities of men and women diverge. Second, the regulation frames the general compliance obligations in terms of program-wide benefits, not benefits for specific sports.[202]

These two cases, *Cohen* and *Pederson*, illustrate opposing views about Title IX and the 1979 *Policy Interpretation* in the context of intercollegiate athletics. The Section has explored the proportionality test relied upon by plaintiffs, the lack of interest argument advanced by institutions, and the analysis of the federal courts in specific factual contexts. More importantly, this discussion exposes the analytical puzzles posed by Title IX and its application to athletics when sex segregated teams are the norm.

II. ANALYTICAL FRAMEWORK

The opposing views in *Cohen* and *Pederson* illustrate the importance of the analytical framework used in Title IX athletics cases. The appropriate analysis to use in these cases is not obvious. Courts and commentators have urged various analytical models based upon analogies to Title VII of the 1964 Civil Rights Act. These suggested analogies are problematic because they ask the wrong questions, ignore important evidence, exclude consideration of crucial issues, or simply muddy the analysis.

For example, in *Cohen v. Brown University*, defendant's statistical expert argued that to assess an institution's effective accommodation of student athletes' interests and abilities in Title IX cases, the appropriate comparison was between the pool of interested potential varsity athletes and the make-up of the university's athletic program, rather than the *Policy Interpretation*'s comparison of undergraduate enrollment and athletic program participation.[203] The defendant based its argument for this comparison on an analogy to Title VII cases.[204] According to the defendant, the relevant comparison in

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202. While the court of appeals reversed the district court with respect to the standing of the soccer plaintiffs, the court did not indicate disapproval of the lower court's sport-to-sport comparison. *Pederson*, 201 F.3d at 409. In fact, in upholding the district court's substantive decision on Title IX, the court of appeals rejected the University's argument that reliance on the fact that LSU offers men's baseball as evidence of discrimination was improper. *Id.*; *see also* Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 271 n.8 (7th Cir. 1994) (rejecting comparison). *But cf.* Cook v. Colgate Univ., 802 F. Supp. 737, 742–43 (N.D.N.Y. 1992) (relying on a sport-to-sport comparison).

203. 879 F. Supp. 185, 205 (D.R.I. 1995).

204. *Id.*

Title VII cases was between the qualified applicant pool and the workplace demographics, rather than between the population of the United States and the workplace demographics.[205]

The urge to look to Title VII cases for techniques and analytical frameworks is understandable. There have been more cases brought under Title VII than Title IX and while there are clear differences in the statutes, both seek to end discrimination on the basis of sex. Moreover, in many Title VII cases, the analytical framework developed by the courts has meant the difference between winning and losing, the difference between unmasking discrimination and failing to see it, or the difference between understanding the harm and excusing certain conduct. And in some cases, statistics are indispensable; for example, proof of discrimination may be inherently statistical because the behavior in question can be observed only in the aggregate.[206]

But the analytical frameworks developed under Title VII make sense only when they are used to address appropriate questions. For example, in *McDonnell Douglas Corp. v. Green*,[207] the Supreme Court announced an analytical approach to simplify the issues in an individual disparate treatment case under Title VII. This approach excludes the most obvious explanations for an adverse action, for example just cause or being unqualified, and then asks the employer defendant for some explanation for its action.[208] The *McDonnell Douglas* "test" is not useful in other situations, such as when the qualifications of the employee or applicant are at issue. Some observers, however, use *McDonnell Douglas* as a shorthand expression to describe some kind of "burden-shifting," but they ignore why and under what circumstances the burden shifts.[209]

The discussion in the literature and cases advocating Title VII analogies is not advanced by several common analytical missteps. This Part considers three commonly made analogies to Title VII and demonstrates why they are inapt and ultimately fail to advance our understanding of the Title IX issues.

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205. *Id.*

206. For further discussion, see Julia Lamber et al., *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 576 (1983).

207. 411 U.S. 792, 802–04 (1973).

208. *Id.* at 802.

209. *E.g.*, Ferrier, *supra* note 46, at 872–73.

A. Analogies to Statistical Comparisons in Hazelwood *&* Teamsters

The first analogy is the use of Title VII's statistical comparisons to infer intentional discrimination. For example, in *Cohen*, the defendant argued that discrimination should be defined by comparing the gender composition of the "*interested* potential varsity athlete pool . . . and the make-up of Brown's athletic program."[210] Brown's comparison is borrowed from *Hazelwood School District v. United States*,[211] a Title VII case where the Supreme Court held that the relevant comparison was between the racial composition of the qualified applicant pool and the employer's current workforce. In doing so, the Supreme Court rejected a comparison used in *International Brotherhood of Teamsters v. United States*,[212] where the plaintiff had compared the employer's workforce with the racial composition of the area's population. The district court in *Cohen* rejected the *Hazelwood* comparison as "inapposite,"[213] because Brown's sports teams, unlike the jobs at issue in the Hazelwood School District, have official gender requirements.[214]

Another fundamental misunderstanding also underlies this proposed use of the *Hazelwood* comparison. In *Hazelwood*, the plaintiffs challenged the Hazelwood School District's hiring practices, alleging that African Americans were underrepresented as teachers in the school district compared to the racial composition of teachers in the relevant labor market.[215] Both parties agreed the "relevant labor market" was the appropriate comparison population, but they disputed how to define that group. Plaintiff argued that the percentage of African American teachers in the school district should be compared to the percentage of African American teachers in the metropolitan area.[216] The defendant argued that the percentage of African American teachers in the school district should be compared to their percentage in the suburban area near Hazelwood, specifically excluding the city of St. Louis.[217] Their disagreement, then, was over the geographic reach of the

210. 879 F. Supp. 185, 205 (D.R.I. 1995).
211. 433 U.S. 299, 310–11 (1977).
212. 431 U.S. 324, 363–64 (1977).
213. *Cohen*, 879 F. Supp. at 205.
214. *Id.*
215. *Hazelwood*, 433 U.S. at 301.
216. *Id.* at 315.
217. *Id.* at 317.

relevant labor market rather than over the qualifications of the group. In contrast, in *Teamsters v. United States*,[218] the U.S. Supreme Court relied on more general population data to conclude that African Americans and Hispanics were underrepresented as over-the-road truck drivers; general population figures were used because there were no special qualifications for these jobs. In both cases the comparisons were used to support an inference of intentional discrimination. In *Teamsters*, the Supreme Court said that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[219]

In a random process, such as jury panel selection, this use of probability theory is straightforward and unremarkable. One compares the racial composition of the jury panel actually selected with the racial composition of those eligible. If this comparison shows that African Americans or Hispanics are underrepresented and the actual outcome would rarely occur if the process were random, then the comparison provides persuasive evidence that the process in fact was not random. Although no one expects employment decisions to be random, we do expect that nondiscriminatory decisions would generate, over the long run, random results with respect to race or gender when these characteristics are irrelevant. Thus, evidence of long-standing and gross disparity between the composition of a workforce and that of the general population or labor market can be important because, given the evidence of availability, the courts are willing to infer that race or gender is the basis of the employment decision.[220]

In transposing this analysis to Title IX athletics cases, the defendant in *Cohen* focused on the difference between general and specific populations in *Teamsters* and *Hazelwood*.[221] Accordingly, the defendant urged the court to adopt *Hazelwood's* definition of the "relevant labor market" as the "qualified applicant pool" rather than *Teamsters* definition of the "relevant labor market" as the

218. 431 U.S. 324, 340 n.20 (1977).

219. *Id.*

220. Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV 869, 897.

221. *See generally* Connolly & Adelman, *supra* note 66, at 849 (describing "how the intercollegiate athletic provisions of Title IX are being applied and how universities can comply with the law in a way that will be least harmful to their athletics programs"); Jeffrey Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 131, 142–45 (1996) (reviewing case law determining Title IX requirements).

area's population.[222] According to the defendant's view, the "qualified applicant pool" in Title IX athletic cases is the narrower, "more qualified," "interested potential varsity athlete pool" as opposed to the more general "population in the community", undergraduate enrollment.[223] *Hazelwood* and *Teamsters* are not, however, in conflict, even though the Supreme Court used different comparison populations. The Court approved the different comparisons because of differences in the jobs at issue and the likelihood that qualifications are distributed throughout the population. In both cases, the claim was based on comparing a proxy for the "expected outcome," where the employer is likely to hire from, with the employer's current workforce. In *Hazelwood*, the relevant labor market could have been defined nationally or in terms of those with teacher certification. In *Teamsters*, the relevant labor market could have been defined in terms of those possessing a valid driver's license.

The question in Title IX athletic cases is: what is a useful proxy for the applicant pool or "expected outcome" in intercollegiate athletics? Defendants' suggestion of "skilled and interested students" is one possibility, but *Hazelwood* does not limit the relevant labor market or qualified applicant pool to actual applicants or to those looking for jobs. In Title VII cases, the courts have abandoned the call for plaintiffs to produce data on actual applicants when they present their *Hazelwood* or *Teamsters* disparate treatment claim, in part, because of the difficulty of identifying "actual applicants" and the likelihood that those who feel they would not be treated fairly would be unlikely to apply.[224] Employers remain free to produce actual applicant data to rebut the inference of intentional discrimination created by the plaintiffs' comparisons.

Similarly, in Title IX athletics cases, "actual applicants" or "skilled and interested students" would be difficult to identify and to quantify for the same reason that it is difficult to measure the relative interests of student athletes. Courts have correctly noted that this interest is not unaffected by past discrimination and current intercollegiate athletic offerings. For example, the court in *Cohen* considered but rejected several possible populations as part of its discussion about whether plaintiffs bear the burden of identifying groups in terms of their "relative interests."[225] The narrower

222. Cohen v. Brown Univ., 879 F. Supp. 185, 205–06 (D.R.I. 1995).

223. *Id.*

224. Courts have abandoned the call for actual applicants despite Justice White's plea to require the data. Dothard v. Rawlinson, 433 U.S. 321, 347–49 (1976) (White, J., concurring in No. 76-255 and dissenting in No. 76-422).

225. *Cohen*, 879 F. Supp. at 206–07.

definitions—"skilled and interested students" or high school athletes where "strictly voluntary" participation reflects "true interests"—are based on the assumption that men are inherently more interested in athletic participation, and any comparison that does not reflect this difference is wrong. In Title VII cases, the courts have also been cautious about using proxies for applicant pools that are or may be tainted.[226]

Finally, even if we could agree on another proxy for the "expected outcome" to compare with the make-up of the institution's athletic program, reliance on the *Hazelwood/Teamsters* inference is misplaced. The Supreme Court relied on the probability theory in *Teamsters* and *Hazelwood* because of its view that nondiscriminatory employment decisions should generate, over the long run, random results with respect to race or gender when those characteristics are irrelevant.[227] That is, in *Teamsters* and *Hazelwood*, courts could infer race was relevant to the hiring decisions because there was such a disparity between the expected outcome and the actual outcome. This same inference is not relevant to Title IX athletic cases where the issue is whether the institution has effectively accommodated the interests and abilities of both sexes. Such an inference might be relevant if institutions had decided to field unisex or coed varsity teams. In most Title IX cases raising the issue of "effective accommodation," however, the institution has made gender relevant because they define teams by gender.[228] There is no need for a statistical inference to see if gender is relevant to the selection; the use of gender is overt and clear.

Several commentators take the *Hazelwood* argument even further. They argue that "[m]andating substantial proportionality without a showing of discrimination, as compelled by *Hazelwood*, violates the Equal Protection Clause."[229] According to this argu-

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226. For example, in *International Brotherhood of Teamsters v. United States*, the Court rejected an employer's argument that a person who has not already applied for a job with the defendant can never be awarded seniority relief: "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." 431 U.S. 324, 365 (1977); *see also* Lamber et al., *supra* note 206, at 585–87; Elaine Shoben, *Probing the Discriminatory Effects of Employment Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977).

227. *Teamsters*, 431 U.S. at 340 n.20.

228. *E.g.*, 2000–01 NCAA DIVISION I MANUAL at 3.2.1.4 (2000) (defining separately the required number of male and female teams), http://www.ucaa.org/library/membership/division_i_manual/article_3.pdf (on file with the *University of Michigan Journal of Law Reform*).

229. Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 835; *see also* Connolly & Adelman, *supra* note 66, at 862–63, 870–71.

ment, courts have turned Title IX into an "affirmative action" statute, contrary to the intention of Congress and the Constitution.[230] This view, however, misunderstands the nature of the claim made in a case analogous to *Hazelwood.* The claim in *Hazelwood* is that the school district intentionally discriminated against African Americans in the hiring of teachers.[231] Evidence that African Americans were underrepresented in the workforce, compared with their availability in the relevant labor market, raised the inference that race somehow matters in the hiring process. The defendant school district remained free to try to rebut this inference by showing, for example, that their recent hires were more representative of the applicant pool. The remedy sought in cases like *Hazelwood* is usually adding some structure to the hiring process, some "affirmative action" advertising efforts, and the like. Rejecting this analogy to *Hazelwood,* the court in *Cohen* concluded that the lack of proportionality was itself evidence of discrimination in violation of Title IX.[232]

Thus, it would be a mistake to incorporate the *Hazelwood/Teamsters* analysis into Title IX athletics cases. *Hazelwood* and *Teamsters* ask different questions and are based on different factual situations than the ones raised by recent Title IX athletics cases. But more importantly, the *Hazelwood* and *Teamsters* cases are useful in exposing otherwise covert discrimination. The Title IX claims here raise issues of equality in a sex segregated system.

B. Analogies to McDonnell Douglas

Before the Supreme Court adopted the analytical framework in *Hazelwood* and *Teamsters,* it developed its Title VII analysis for claims of individual disparate treatment. In *McDonnell Douglas Corp. v. Green,*[233] the Court adopted a three step process for cases of individual discrimination where there was no direct proof of intentional discrimination. In their search to find the appropriate analytical framework for Title IX cases, courts have erroneously adopted the *McDonnell Douglas* model.

230. Connolly & Adelman, *supra* note 66, at 871.

231. *See supra* text accompanying notes 215–17.

232. Cohen v. Brown Univ., 879 F. Supp. 185, 207 (D.R.I. 1995); *see also* Weistart, *supra* note 84, at 232 n.143 ("To suggest that women who win under Title IX are the beneficiary [sic] of 'affirmative action' or a 'quota' treats the basic claim of discrimination as somehow unjust or unfair. As typically used in the sports context, such a phrase is largely a veiled argument for continuing the historic status quo of substantial male preferences.").

233. 411 U.S. 792, 792–93 (1973).

For example, in *Cook v. Colgate University*,[234] plaintiffs challenged Colgate's decision to maintain women's ice hockey as a club sport as a violation of Title IX. For more than ten years, women student players had asked Colgate to elevate the sport to varsity status, but Colgate's Committee on Athletics turned them down four times.[235] Each time the committee reasoned that 1) ice hockey was rarely played on the secondary level; 2) championships were not sponsored by the NCAA; 3) the game was played at only fifteen colleges in the east; and 4) hockey was expensive to fund, which would heavily impact the total intercollegiate program.[236] Colgate maintained that Title IX prohibits discrimination only in an athletic program considered as a whole and that plaintiffs' challenge was simply over its decision to maintain the club status of women's ice hockey.[237] Colgate also argued that it is improper to compare a women's club team with a men's varsity team.[238]

The court noted that the Title IX standard provided that "'equivalent benefit and opportunities must be provided' . . . to men and women,"[239] and in determining whether such athletic opportunities are available to men and women, courts should consider "whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes."[240] In making this determination, the court found that "there is little guidance for the method to use in concluding whether there is a violation of Title IX,"[241] apparently ignoring the detailed *Policy Interpretation* of 1979.

At the urging of both parties, the court adopted the three step process for determining gender discrimination used in Title VII cases.[242] "This appears to be an appropriate approach," reasoned the court, "in view of the fact that there is no direct proof of intentional discrimination by Colgate."[243] Under the Title VII analysis of *McDonnell Douglas Corp. v. Green*,[244] once the plaintiff succeeds in establishing a prima facie case of discrimination, then the burden shifts to the defendant to come forward with evidence of some legitimate nondiscriminatory reason for its conduct. If the defendant

234. 802 F. Supp. 737, 739 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).
235. *Id.* at 740.
236. *Id.*
237. *Id.* at 742.
238. *Id.*
239. *Id.* at 743 (citation omitted).
240. *Id.* (citation omitted).
241. *Id.*
242. *Id.*
243. *Id.*
244. 411 U.S. 792, 802 (1973).

establishes legitimate reasons for its decisions, then the plaintiff, in order to prevail, must show that the reasons advanced by the defendant are a pretext for discrimination.[245]

The court in *Cook* recast this three step process for Title IX. To establish a prima facie case, the plaintiffs must demonstrate 1) that the athletic department is subject to the provisions of Title IX; 2) that they are entitled to the protection of Title IX; and 3) that they have not been provided "equal athletic opportunities."[246] If plaintiffs prove a prima facie case, they will have established a rebuttable presumption that Colgate violated Title IX.[247] This presumption disappears if Colgate comes forward with legitimate nondiscriminatory reasons for its decision not to upgrade the women's hockey team to varsity status.[248] Once Colgate has introduced such evidence, in order to prevail, the plaintiffs must prove that Colgate's proffered reasons are merely a pretext.[249] The court noted that steps one and two were not contested,[250] so the critical factor is the third, that is, whether Colgate has provided them with equal athletic opportunities.

Relying on the list of factors in the Title IX regulation to determine whether equal athletic opportunity is available, plaintiffs showed differences between men and women's ice hockey at Colgate in six categories: expenditures, equipment, locker room facilities, travel, practice times, and coaching, thereby establishing a prima facie case.[251] Colgate responded by saying the reason for these differences is that, at Colgate, men's ice hockey is a varsity sport and women's ice hockey is a club sport. Colgate then gave the same four reasons for its refusal to elevate the club sport to a varsity team as well as two additional ones: lack of student interest and lack of ability. The court rejected all of the reasons except cost, concluding that the other five reasons for Colgate's decision were "factors which are not going to change to any significant degree in the near future."[252] "Therefore, the court can only conclude that all of the above reasons are not legitimate reasons to deny equality, but must be considered a pretext for discrimination in violation of Title IX."[253] Finally, the court rejected cost as a justification for gender discrimination and ordered Colgate to

245. *Id.* at 804.
246. 802 F. Supp. 737, 743 (N.D.N.Y. 1992).
247. *Id.*
248. *Id.*
249. *Id.* at 743–44.
250. *Id.* at 744.
251. *Id.* at 744–45.
252. *Id.* at 749.
253. *Id.*

grant varsity status to women's ice hockey the following academic year.[254]

Whether Colgate provided women and men equal athletic opportunities is the correct issue, but the court's analysis of that issue is not advanced by its use of the *McDonnell Douglas* framework, which is merely a more cumbersome way of asking the same question. In contrast, the original four factors in *McDonnell Douglas*, while not difficult to meet, were intended to narrow and focus the factual inquiry. The plaintiff in *McDonnell Douglas* established a prima facie case of intentional racial discrimination in hiring by showing that 1) he belonged to a racial minority; 2) he applied and was qualified for a job for which the employer was seeking applicants; 3) despite his qualifications, he was rejected; and 4) after his rejection, the position remained opened, and the employer continued to seek applicants from persons with qualifications similar to the plaintiffs.[255] These questions were reasonable in light of the facts in *McDonnell Douglas* because the applicant had once worked successfully as a mechanic for the employer and the employer was looking for mechanics a few months after the plaintiff had been laid off.[256] The four factors listed by the Court establish a prima facie case by eliminating the most common or obvious reasons for an employer not to hire someone. That is, if the applicant possessed the necessary qualifications and there was a job opening, race is a "reasonable" explanation for what happened. This inference is not at issue in cases like *Cook* because the difference in treatment on the basis of sex is apparent. The real issue in *Cook* is whether the differences represent unequal athletic opportunity or whether the differences in athletic opportunity can be justified.

By using the *McDonnell Douglas* three-part framework, the court in *Cook* not only failed to sharpen the factual inquiry, but it also actually made the issues more confusing. If the plaintiffs' claim is whether Colgate provided women and men equal athletic opportunities, then the court's modified *McDonnell Douglas* standard, which asks plaintiffs to prove that they have not been provided "equal athletic opportunities" as part of their prima facie case, makes no sense. It mixes the ultimate question with the preliminary ones in a prima facie case. The problem with the *Cook* court's analytical standard, however, is more than merely confusing conclusions with analysis because of the effect this confusion has on the defendant's obligation. Under *McDonnell*

254. *Id.* at 750–51.
255. 411 U.S. 792, 802 (1973).
256. *Id.* at 794.

Douglas, the plaintiffs' prima facie case creates a presumption that the defendant can then rebut with a fairly minimal burden of production of evidence, namely that the plaintiff was rejected for a legitimate, nondiscriminatory reason. Subsequent cases tell us that the proffered reason does not need to be a very good reason or indeed even the actual reason for the decision.[257] In contrast, if the ultimate Title IX issue is whether Colgate provided women or men equal athletic opportunities, then once the plaintiff produces persuasive evidence on this issue, the burden of proof shifts to the defendant to justify this difference in treatment. On this issue, the defendant has a tough burden of proof, that is to satisfy the court that there is a very good reason for this gender difference.

In *Cook*, plaintiffs viewed the differences between men and women's ice hockey at Colgate to be a result of Colgate's failure to provide equivalent athletic benefit and opportunities to men and women.[258] Alternatively, they believed these differences illustrated that the selection of sports and levels of competition did not effectively accommodate the interests and abilities of members of both sexes.[259] Understood in these terms, the plaintiffs' claim seeks to challenge the kinds of sports offered at the varsity level at Colgate, the number of women and men participating, as well as the funds that supported these programs.[260]

A more complete analysis of how ice hockey fits with the other offerings at the varsity level is needed. The *Policy Interpretation*, which the court did not discuss, states that "[i]n the selection of sports, the regulation does not require the institutions to . . .

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257. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (stating that whether a defendant has met has burden of production does not involve a credibility assessment); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (stating that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons" to satisfy its burden of production).

258. 802 F. Supp. 737, 745 (N.D.N.Y. 1992).

259. *Id.* at 750.

260. The court indicated that the budgetary allocations between men and women's sports was considerably unequal. Specifically, the court stated that:

> If football is excluded, then there are eleven varsity sports for each gender. Making a comparison of the eleven varsity sports for each gender in 1990–91, shows a budget for men's varsity sports of $380,861.00, and for women's varsity sports of $218,970.00. . . . With football included, . . . the total budget for men's varsity sports was $654,909.00.

Id. at 742. The court goes on to explain in a footnote that "[t]his does not include Coach Supported Financial Aid (tuition, room, board, and jobs) which is much greater for men." *Id.* at 742 n2.

provide exactly the same choice of sports to men and women."[261] It goes on to say, however, that where an institution does sponsor a team in a contact sport for members of one sex, as Colgate does with men's ice hockey, it may be required to sponsor a separate team for the previously excluded sex.[262] This is the case if the opportunities for the excluded sex have historically been limited, there is sufficient interest and ability among the members of the excluded sex to sustain a viable team, and there is a reasonable expectation of intercollegiate competition for that team.[263] Thus, the factors raised by Colgate in defense of the Title IX claim are far from "pretextual;" under the *Policy Interpretation*, they are the very issues the court should consider.

Although the *Policy Interpretation* does not favor the sport-to-sport comparison used by the court in *Cook*, such a comparison might properly be part of the larger claim of unequal athletic benefits. The *Policy Interpretation* states that "neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide *arbitrarily* identical programs, either in whole or in part."[264] In addition, the sport-specific concept overlooks two key elements of the Title IX regulation. First, the regulation states that the selection of sports should be representative of student interest.[265] A requirement that a sport be available (at the same level with the same support) *solely* on the basis of its existence for members of the other sex could be a problem when men's and women's interests diverge. Second, as Colgate urged in its original argument, the regulation frames compliance in terms of program-wide benefits.[266] Thus, the reason not to make women's ice hockey a varsity sport at Colgate may be that there is more interest among the women in crew, volleyball, or gymnastics, or that the athletics department has decided to increase its support for existing women's sports. Conversely, the reason not to make it a varsity sport may be the University's stereotypical ideas about women and "appropriate" sports offerings for them. Without more information on Colgate's athletic program as a whole, it was difficult for the court to evaluate the university's decisions. The court's use of the *McDonald Douglas* analytical

261. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,417–18 (Dec. 11, 1979).

262. *Id.* at 71,418.

263. *Id.*

264. *Id.* at 71,422 (emphasis added).

265. 34 C.F.R. § 106.41(c)(1) (1999).

266. *See id.*

framework, however, leads it to ask the wrong questions, to focus on the wrong evidence, and ultimately to decide the wrong issues.

C. Analogies to Disparate Treatment and Disparate Impact

Other commentators view Title IX intercollegiate athletic cases as developing a hybrid disparate treatment—disparate impact theory of discrimination.[267] Under this hybrid, Title IX athletics plaintiffs need not prove discriminatory intent; facially sex-neutral actions may be the basis of Title IX noncompliance.[268] At the same time, proof of disparate impact alone does not establish a Title IX violation; plaintiffs "must accompany statistical evidence of disparate impact with some further evidence of discrimination, such as unmet need"[269] among the underrepresented sex.

In *Roberts v. Colorado State University*,[270] students and former members of the University's softball team brought suit against Colorado State University (CSU) and its governing board, Colorado State Board of Agriculture, after CSU announced that it was discontinuing the varsity softball program. With this termination, the disparity between undergraduate enrollment and athletic participation for women at CSU was 10.5%.[271] The defendant argued that a 10.5% disparity met the *Policy Interpretation*'s safe harbor of "substantial proportionality."[272] Rejecting the defendants' position and finding a violation of Title IX, the district court issued a permanent injunction requiring the defendant to hire a coach, recruit new members for the team, and organize a fall season.[273] The court of appeals upheld the district court's decision and concluded that the lower court had not erred in failing to require proof of discriminatory intent.[274] In reallocating the burden of proof, however, the court of appeals held that

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267. *See, e.g.*, Philip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS L. J. 75, 88 (1995).

268. *Id.*

269. Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

270. 814 F. Supp. 1507, 1510 (D. Colo. 1993), *aff'd sub nom.* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).

271. *Id.* at 1512.

272. *Roberts*, 998 F.2d at 829.

273. *Roberts*, 814 F. Supp. at 1509.

274. *Roberts*, 998 F.2d at 832–33.

> [b]ecause a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, ... plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes.[275]

Commentators view this case as depicting Title IX's equality model as "a sort of disparate impact-plus standard"[276] derived by analogy to Title VII of the Civil Rights Act of 1964.

Developed under Title VII, the disparate treatment theory of discrimination involves allegations of intentional discrimination; plaintiffs assert that considerations of race, gender, or the like influence an adverse employment decision. Proof of impermissible motive is crucial, but a court may infer this motive from differences in treatment.[277] In contrast, disparate impact claims involve allegations of "unintentional" discrimination.[278] Plaintiffs challenge facially benign employment policies that fall more harshly on minority group members or women than on others. Proof of impermissible motive is not essential, but the defendant may avoid liability by proving that the challenged employment policy is central to its legitimate business interests.[279] In their traditional and classic forms, these two analytical frameworks serve different purposes and seek to effectuate two different theoretical conceptions of equality.

Under Title IX and its applicable regulation, a plaintiff may also make either a disparate treatment or a disparate impact claim. As with other analogies to Title VII, one needs to be mindful of the evidence and its purpose in particular cases for the analogy to be useful. Each decision of the U.S. Supreme Court approving the disparate impact theory under Title VII illustrates the analytical framework in its classic form. Each case involved a challenge to a clearly identified, objective employment policy that was applied at a determinative point in the employment process and related causally to the observed adverse impact on minority group members or women. For example, plaintiffs argued the effect of a height and weight requirement excluded a disproportionate num-

275. *Id.* at 831.
276. Anderson, *supra* note 267, at 88.
277. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
278. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
279. *Id.* at 431.

ber of women and was not justified;[280] plaintiffs showed that the failure to have a high school diploma had an adverse impact on African Americans;[281] and plaintiffs proved that discriminatory employment tests were unrelated to the employment in question.[282] In each instance, the burden of proof shifts to the defendant employer to show that the rule, requirement, or test is job-related. Under Title IX, one would expect a disparate impact claim if plaintiffs wanted to challenge a facially neutral requirement, such as prior membership on a varsity team in order to be a member of a certain social fraternity. On the other hand, one would expect a disparate treatment claim if plaintiffs wanted to challenge a priority system that allowed football players to register for classes before anyone else.

Claims like the one in *Roberts*[283] do not fit neatly into either theoretical framework. As a result, adopting those frameworks may lead the courts and litigants to focus on the inappropriate questions. For example, in *Roberts*, the court acknowledged the aptness of the analogy to Title VII in some Title IX cases but went on to state that, in that case, Title IX and its implementing regulations (including the *Policy Interpretation*) offered enough guidance in setting the burden of proof and application of the Title VII model was unnecessary.[284] The plaintiffs challenged the elimination of softball as a varsity sport on grounds that, by definition, softball was a women's sport, and thus, its elimination was not sex-neutral.[285] Such gender specific actions do not necessarily violate Title IX's *Policy Interpretation*, however. The question was whether an institution such as CSU provides "equal athletic opportunity" for members of both sexes, considering, among other factors, whether the selection of sports and levels of competition effectively accommodated the interests and abilities of members of both sexes. The *Policy Interpretation* further expands this inquiry by suggesting that if women do not participate proportionately in athletics, an institution may be in violation of Title IX, if evidence shows that there is not a program of current expansion or that there is unmet athletic interest and ability.[286] Hence, the court of appeals in *Roberts* required that "plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not

280. Dothard v. Rawlinson, 433 U.S. 321, 323–24 (1977).
281. Griggs v. Duke Power Co., 401 U.S. 424, 425–26 (1971).
282. Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975).
283. *See supra* notes 269–70 and accompanying text.
284. Roberts v. Colo. State Univ., 998 F.2d 824, 833 n.14 (10th Cir. 1993).
285. *Id.* at 830.
286. *See id.* at 829.

fully and effectively accommodate the interests and abilities of its women athletes."[287] This conclusion was not an illustration of a disparate impact/disparate treatment hybrid model. Rather, it was the answer to a different set of questions posed specifically by the *Policy Interpretation.*

Looking to analytical frameworks developed under Title VII is understandable. While still controversial itself, Title VII law is familiar to civil rights litigants and to the courts. Analogies are problematic, however, when they ask the wrong questions, ignore important evidence, exclude consideration of crucial issues, or simply muddy an analysis. The court in *Roberts* did the right thing to ignore the Title VII model; other courts and litigants should be as thoughtful.

III. CONSTITUTIONAL CONSIDERATIONS

The major difference between the questions that arise in Title IX athletics cases and those that arise in the employment arena under Title VII is that most intercollegiate athletics teams are defined by gender. The current prevalence of separate teams for men and women, however, has not been uncontroversial. Originally, there was much litigation over whether all-male teams were required to allow qualified females to try out and play for the team, from Little League to college football teams.[288] The constitutional dimensions of the issue are unclear. The U.S. Supreme Court has never decided whether gender-based "separate but equal" teams in athletics is constitutionally permissible; nor has it decided the constitutionality of an alternative scheme, that is, unisex teams open to men and women but where women do not succeed on the same basis as men.[289]

This Part reviews the Supreme Court decisions on gender discrimination, including its most recent decision in *United States v.*

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287. *Id.* at 831.

288. *E.g.,* Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Carnes v. Tenn. Secondary Sch. Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976); Thomas F. Quinn, Case Comment, Gomes v. R.I. Interscholastic League, *469 F. Supp. 659 (D.R.I. 1981),* 14 SUFFOLK U. L. REV. 1471, 1478–79 (1980); *see also* Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality,* 1 BERKELEY WOMEN'S L.J. 201, 212–17 (1985) (analyzing challenges to the separate but equal doctrine in educational sports programs by female and male plaintiffs respectively).

289. *See infra* text accompanying notes 309–26.

Virginia.[290] It concludes that Title IX's *Policy Interpretation* is a useful description of a constitutional separate-but-equal athletic program, especially if differences between women and men sports are valid, rather than based on overbroad generalizations about women's talents, capabilities, or preferences.

In 1971, the U.S. Supreme Court first held unconstitutional a state law classifying people on the basis of gender. In *Reed v. Reed*,[291] the Court struck down an Idaho statute requiring that among "several persons claiming and equally entitled to administer [a decedent's estate] males must be preferred to females."[292] While gender-based classifications have never been analyzed with the same degree of rigor or suspicion as racial ones, since *Reed*, courts have "carefully inspected official action that closes a door or denies an opportunity to women (or to men)."[293] Typically, a state must show that the challenged classification bears a substantial relationship to important governmental objectives.[294] The justification must be genuine, and it must not rely on overbroad generalizations about the different talents, capabilities, and preferences of men and women.[295] According to Chief Justice Rehnquist, the principle underlying the decisions in the Supreme Court's recent gender discrimination cases is that the legislature may not make overbroad generalizations based on sex that are entirely unrelated to any differences between men and women or that demean the ability or social status of the affected class.[296]

The Supreme Court has found some gender-based classifications permissible, however. In *Califano v. Webster*,[297] the Court upheld a congressional statute that provided higher social security benefits for women than for men, reasoning that "women . . . as such have been unfairly hindered from earning as much as men."[298] Similarly, in *Rostker v. Goldberg*,[299] the Court upheld a federal law requiring men but not women to register for the draft because the purpose of the registration was to prepare for a draft

290. 518 U.S. 515 (1996).
291. 404 U.S. 71, 73 (1971).
292. *Id.*
293. *Virginia*, 518 U.S. at 532.
294. Craig v. Boren, 429 U.S. 190, 197 (1976).
295. *Reed*, 404 U.S. at 76.
296. Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 469 (1981) (citing Parham v. Hughes, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.)).
297. 430 U.S. 313, 318 (1977).
298. *Id.*
299. 453 U.S. 57, 77 (1981).

of combat troops, and women were not eligible for combat.[300] In *California Federal Savings & Loan v. Guerra*,[301] the Court upheld a state law that granted some women but not men a leave of absence and job reinstatement because it promoted equal employment opportunity.[302]

The Supreme Court has also upheld statutes where the gender classification is not invidious, but rather reflects the fact that men and women are not "similarly situated" in certain circumstances. For example, in *Michael M. v. Sonoma County*,[303] a seventeen-year-old boy sought to set aside the criminal complaint of statutory rape, asserting that the statute unlawfully discriminated on the basis of gender as males alone were criminally responsible under the statute. The California Supreme Court had upheld the statute, finding that the state had a compelling interest in preventing teenage pregnancies and that because males alone can "physiologically cause the result which the law properly seeks to avoid,"[304] the gender classification was justified as a means of identifying offender and victim.[305] The U.S. Supreme Court affirmed, primarily because of its view that men and women "are not similarly situated with respect to the problems and the risks of sexual intercourse"[306] or pregnancy and because the statute was realistically related to the legitimate state purpose of reducing those problems and risks.[307] The Court noted that since only females are subject to a risk of pregnancy, a criminal sanction imposed solely on males serves to roughly equalize the deterrent effects on both sexes.[308]

In the most recent equal protection challenge,[309] the Supreme Court was faced with the claim that sex-segregated educational programs were equal and therefore constitutional. The Supreme Court, however, struck down Virginia's attempt to exclude women from the Virginia Military Institute (VMI) and held that its attempt to provide equivalent training and education at a private women's college was inadequate.[310] The United States sued Virginia and VMI, Virginia's only single-sex public institution of

300. *Id.*
301. 479 U.S. 272, 289 (1987).
302. *Id.*
303. 450 U.S. 464 (1981).
304. Michael M. v. Sonoma County, 601 P.2d 572, 575 (1979).
305. *Id.*
306. *Michael M.*, 450 U.S. at 471.
307. *Id.* at 472–73.
308. *Id.* at 473.
309. United States v. Virginia, 518 U.S. 515 (1996).
310. *Id.* at 520.

higher education, alleging that VMI's exclusively male admission policy violated the equal protection clause of the Fourteenth Amendment.[311] Virginia asserted two justifications. First, single sex education provides important educational benefits, and the option of single sex education contributes to the diversity in educational approaches.[312] Second, the school's adversarial approach, the unique method of character development and leadership training, would have to be modified if women were admitted to VMI.[313]

The Court rejected Virginia's arguments, noting that while diversity may be an acceptable goal, Virginia had not shown that VMI was established or maintained with a view toward diversifying educational opportunities within the state, especially because the only single-sex opportunity was available exclusively to men.[314] According to the Court,

> [a] purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan—a plan to "affor[d] a unique educational benefit only to males." However, "liberally" this plan serves the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.[315]

The Court also rejected Virginia's argument that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women.[316] The United States did not challenge expert witness estimations of the average capabilities or preferences of men and women. Instead, it emphasized the need to take a "hard look" at the generalizations and "tendencies" pressed by Virginia.[317] The Court rejected the notion that admission of women would downgrade VMI's stature and destroy the adversative system.[318] Noting that most women would not choose VMI's adversative method, the Court said the question was "whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."[319]

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311. *Id.* at 523.
312. *Id.* at 535.
313. *Id.* at 540.
314. *Id.*
315. *Id.* at 539–40.
316. *Id.* at 546.
317. *Id.* at 541.
318. *Id.* at 542.
319. *Id.*

Finally, the Court turned to the question of whether Virginia's alternate program, Virginia Women's Institute for Leadership (VWIL), was sufficient to allow VMI to continue as a male-only college. The court of appeals had concluded that it did, deciding that the two single-sex programs directly served Virginia's purposes of single gender education while achieving the results of an adversative method in a military environment.[320] Inspecting the two programs to determine whether they afforded to men and women benefits comparable in substance if not in form and detail, the court concluded that they did sufficiently to survive an equal protection challenge.[321] Reversing, the Supreme Court found that the alternate program was not sufficiently like the program at VMI to qualify as VMI's equal.[322] The VWIL's student body, faculty, course offerings and facilities do not match VMI's.[323] Nor could the VWIL graduates anticipate the same benefits associated with VMI's history, school prestige, and its influential alumni network.[324] The Court concluded that while the program at VWIL might be valuable to those who seek *that* program, the remedy offered no cure for the opportunities and advantages withheld from women who wanted a VMI education.[325] In short, Virginia was offering separate but not equal programs.[326]

In applying these constitutional lessons to the question of gender discrimination in intercollegiate athletics, schools could integrate their men's teams, declaring that membership on all athletic teams will be determined by skill. It is probable that some women, but not many, would make the various squads. The Title IX *Policy Interpretation* contemplates that when a school has a single-sex team based on ability, the institution may have a duty to offer another single-sex team for women if their opportunities have been underrepresented in the past.[327] The *Policy Interpretation* and an early department memorandum clearly take the position that opening teams to members of both sexes is not sufficient.[328] Under

320. United States v. Virginia, 44 F.3d 1229, 1239 (4th Cir. 1995).

321. *Id.* at 1240–41.

322. *Virginia*, 518 U.S. at 515.

323. *Id.* at 557.

324. *Id.*

325. *Id.* at 555.

326. *Id.* For a further discussion of *United States v. Virginia*, see Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 72–79 (1996); Deborah A. Widiss, *Re-Viewing History: The Use of the Past as Negative Precedent in* United States v. Virginia, 108 YALE L.J. 237 (1998).

327. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

328. *See* Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 48 (1977) (citing to Policy Interpretation and Office for Civil Rights, Dept. of Health, Educ. &

this view, expansion of women's athletic opportunities is a separate, distinct goal of Title IX. In a 1975 memorandum providing guidance to schools concerning their first year responsibilities in complying with the athletics provisions of the regulations, OCR wrote: "[A]n institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's teams."[329] The Supreme Court, however, has not decided the constitutional ramifications of programs that treat women and men exactly alike when one sex does not succeed as well as the other.[330]

Alternatively, schools could provide separate but equal athletic programs for men and women, but we do not have many examples of what equality looks like under such schemes.[331] Ensuring equality in terms of scholarships and other program components, such as recruitment, equipment, travel, and practice times, is one part. Schools would need to compare the availability, quality, and kinds of benefits, opportunities, and treatment afforded men and women athletes. Differences such as rules of play, rate of injury, or nature of facilities required would not necessarily make the separate programs "unequal." The *Policy Interpretation,* for example, provides that as long as the institution meets the sports specific needs of both men and women, "differences in particular program components will be found to be justifiable."[332] What is difficult to know in advance is how many teams or female participants an institution should have in order to "desegregate" an all-male program or avoid an "identifiable" male athletic program.[333]

Welfare, Memorandum on Elimination of Sex Discrimination in Athletic Programs (Sept. 1975), *available at* www.ed.gov/offices/OCR/docs/holmes.html (last visited Feb. 15, 2001)).

329. *Id.* at 48 n.87.

330. VMI did not raise this issue in *United States v. Virginia,* 518 U.S. 515 (1996). What if, for example, VMI had said that it would admit women but make absolutely no changes in its program? The Court was not faced with this question, because all parties conceded that the admission of women would require some changes to the adversative methods. *Id.* at 540–41. Thus, in terms of Title IX and intercollegiate athletics, we do not know whether the Constitution would require institutions simply to open up previously all-male teams, make changes in the rules of football or other contact sports so that women could participate, or permit separate teams for men and women.

331. *See, e.g.,* O'Connor v. Bd. of Educ., 449 U.S. 1301 (1980) (holding that in a contact sport such as basketball, where a school district maintains separate girls and boys programs and devotes equal time, money, personnel, and facilities to each, there is a strong probability that the gender-based classification can be justified).

332. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,416.

333. An analogy can be made to school desegregation remedy cases under the Fourteenth Amendment. *See, e.g.,* N.C. State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).

The *Policy Interpretation*'s three-part test is one answer to this question. Determining whether an institution has effectively accommodated the interests and abilities of men and women athletes is not simply an easy-to-administer enforcement policy; rather, it also makes sense. There are "enough" teams or participants if the number of women athletes is roughly the same as the number of women undergraduates. This comparison provides a proxy for what the expected outcome would be if athletic opportunities had been offered to both sexes or offered on a non-sex-segregated basis. Like jury selections, absent discrimination, one could expect that the number of men and women participating in varsity athletics would mirror the number of men and women available in the student body.

The reality of intercollegiate athletics is, however, different; one cannot reasonably expect all athletic programs to mirror the populations of the institutions' undergraduate population. What would an alternative goal be, if we are looking for a separate but equal program? Given that women have been historically excluded from athletic opportunities or offered them at an entirely different level, it makes sense that a separate but equal program would take time to develop or mature. Thus, the second prong of the *Policy Interpretation* states that an institution is protected if it can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex."[334] In other words, the institution does not need to have an "equal" men's and women's program in an instant (or even in five or ten years). Moreover, under prong three, an institution can show that it has tried to offer an athletic program for women that is equal to that offered to men but that women are not interested, capable, or able to compete.[335] Thus, if prong three were applicable to *United States v. Virginia*, it would provide VMI with a defense if VMI accepted and recruited women, but few who applied succeeded. Thus, the *Policy Interpretation* can serve as a useful description for what separate but equal in intercollegiate athletics might look like constitutionally.[336]

The decision in *United States v. Virginia* suggests that separate but equal athletic programs would be upheld only if the differences between men and women are real rather than based on overbroad

334. Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. at 71,418.

335. *Id.*

336. The dissent in *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), offers a different reading of *United States v. Virginia* and the constitutional questions. *See* discussion *supra* note 164.

generalizations about the talents, capacities, or preferences of males and females. The Court reiterated that gender classifications "may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women."[337] Thus, the final question is whether by offering separate athletic programs institutions are recognizing real differences between men and women or whether they are perpetuating stereotypes that women cannot, or should not, compete with men. Stereotypes would seem to explain much of the treatment (or non-treatment) of women in sports in the first part of the twentieth century. The common perception of women as delicate, private, and passive, as well as societal beliefs about appropriate activities for women, severely limited women's participation in sports. Women were considered too weak and fragile for competitive sports; of special concern were the effects of such sports on women's reproductive functions.[338]

In the 1970s, the same social pressures that brought women to corporate board rooms and courtrooms began to break down artificial barriers to women's participation in athletics. Originally, women argued for the opportunity to participate on men's teams, in part perhaps because women's teams, as we know them, did not exist.[339] During this time, women's college athletic programs were affiliated with and administered by the departments of physical education.[340] Budgets were limited and facilities were lacking.[341] In one case challenging a school district's policy of maintaining both boys' and girls' basketball teams, the female plaintiff argued that the programs were not equal because participation with "girls of substantially lesser skill was not as valuable as competition with persons of equal or better skills in the boys' program."[342]

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337. United States v. Virginia, 518 U.S. 515, 534 (1996) (citing Goesaert v. Cleary, 335 U.S. 464, 467 (1948)).

338. Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 109 (1991); *see also* RUTH M. SPARHAWK ET AL., AMERICAN WOMEN IN SPORT, 1887–1987: A 100-YEAR CHRONOLOGY, at xiii (1989) (introducing a chronology of female sports achievement with recognition that, in the nineteenth century, "accepted patterns of behavior for women reflected frailty, ill health, and weakness"); U.S. COMM'N ON CIVIL RIGHTS, PUB. NO. 63, MORE HURDLES TO CLEAR: WOMEN AND GIRLS IN COMPETITIVE ATHLETICS 1–3 (1980) (discussing traditional stereotypes that served as barriers to female participation in sports).

339. *Cf.* Olson, *supra* note 338, at 115 (discussing equal protection litigation that sought to secure female positions on all-male teams).

340. *See id.* at 110–11.

341. *See* Jennifer Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 144–45 (1995).

342. O'Connor v. Bd. of Educ., 645 F.2d 578, 579 (7th Cir. 1981). For the argument that separate teams violate the Fourteenth Amendment's equal protection guarantee, see generally Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Karen Tokarz, *Separate But Unequal*

Nevertheless, since the 1980s, the major thrust of gender equity in athletics has been to create, expand, and support separate athletic opportunities for women. Today, rather than argue that women can compete on men's teams, most of the focus is on the differences between men's and women's sports. For example, in *Cohen v. Brown University*,[343] the court rejected the suggestion that the size of men's teams should set the standard for women's teams. The court pointed out that, even though they may share the same name, men's and women's teams have different rules of substitution, contact amount, size of field, and number of specialized positions that can affect appropriate team size.[344] According to an expert witness, softball and baseball are two completely different sports with baseball having a larger team primarily because of the differences in pitching in the two sports.[345] This focus on the differences between men's and women's sports avoids the question of whether women are inherently slower, weaker, and smaller than men. While in absolute terms these biological differences are true today, this "real difference" argument assumes that current forms of athletic competition, which are male-based in origin and development, must be continued.[346]

Difficult constitutional questions about gender, Title IX, and intercollegiate athletics remain unanswered. In the end these questions turn on the social construction of athletic heroes. It is important for all of us to know that women, as well as men, can be athletic heroes. The next Section discusses some of the ways institutions have chosen to develop their athletic programs to meet the demands of the Constitution and Title IX and to provide female athletes with opportunities to become celebrated in sports.

IV. THE DATA

This Part presents an empirical study, looking first at gender equity plans written by institutions of higher education for the National Collegiate Athletic Association and then at data from more than 325 institutions, pursuant to the Equity in Athletics Disclosure

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Educational Sports Programs: The Need for a New Theory of Equality, 1 BERKELEY WOMEN'S L.J. 201 (1985).

343. 879 F. Supp. 185, 204 (D.R.I. 1995).

344 *Id.* at 204 n.39.

345. *Id.*

346. Snow & Thro, *supra* note 44, at 40 n.141; *see also* Farrell *supra* note 63, at 1015–20.

Act.[347] The gender equity plans provide narrative information about how institutions plan to come into compliance with Title IX. They are not advocacy documents but rather strategic planning documents. They are useful to see different ways institutions plan to tackle the gender equity issues on their campuses. In contrast, information disclosed pursuant to the Equity in Athletics Disclosure Act is quantitative data that provides answers to basic Title IX inquires: What is the enrollment at the institution? How do the numbers of athletes compare with that enrollment? What is the proportion of the recruitment or aid budget that goes to women athletes? What are the revenues and expenses for men and women sports?

This information suggests that the four myths surrounding discussions of Title IX and intercollegiate athletics should be rejected.[348] First, successful football programs and Title IX compliance are not inconsistent. While critics have often sought to protect football from Title IX compliance efforts, the data shows schools with football programs do comply with Title IX.[349] In fact, football may make it easier to have successful women's athletic programs. Second, opponents of Title IX claim that men's teams have been eliminated to pay for women's teams.[350] While there is often public relations rhetoric to support this claim, the data submitted by higher education institutions demonstrate otherwise. Third, opponents of Title IX claim that football and men's basketball should be exempt from the requirements of Title IX because they financially assist women's sports.[351] Football and men's basketball produce positive net revenues at some schools, but they do not produce positive net revenues at smaller schools or at the big-time athletic programs that do not sponsor football.[352] Even if all schools produced positive net revenues, it is difficult to understand why this factor would lead to exempting those men's sports. Fourth, men's teams need not suffer in order to enhance women's teams, nor must intercollegiate athletics be enhanced at the expense of academics. The data suggests that, at least at many institutions, athletic budgets are not declining and thus can accommodate many Title IX goals.[353]

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347. 20 U.S.C. § 1092(g) (2000). All data and plans are on file with the author.
348. *See supra* text accompanying notes 5–7.
349. *See infra* text accompanying notes 388–93, 398–400.
350. *See* Weistart, *supra* note 84.
351. *Compare* Ferrier, *supra* note 46, at 871–72, *with* Farrell, *supra* note 63, at 1028–36.
352. *See infra* text accompanying notes 402–05.
353. *See infra* text accompanying notes 396–404.

A. NCAA Certification and Gender Equity Plans

The National Collegiate Athletic Association (NCAA) initially worked to limit the reach of Title IX in intercollegiate athletics by urging that revenue producing sports be exempt from the Title IX regulation.[354] The NCAA then challenged the regulation in federal court, arguing that the Office for Civil Rights had exceeded its regulatory authority by issuing the regulation.[355] Nevertheless, in 1981, the NCAA created women's championships in nine sports and at three division levels.[356]

In 1991, at the request of the National Association of Collegiate Women Athletic Administrators, the NCAA surveyed its members about expenditures for women's and men's athletic programs.[357] In 1992, the NCAA established a gender equity task force and charged it with defining gender equity, examining NCAA policies to evaluate their impact on gender equity, and recommending a strategy to measure and realize gender equity in intercollegiate athletics.[358] The task force adopted the following definition of gender equity: "[G]ender equity in intercollegiate athletics describes an environment in which fair and equitable distribution of overall athletics opportunities, benefits and resources is available to women and men and in which student-athletes, coaches and athletics administrators are not subject to gender-based discrimination."[359] The task force also supported the Committee on Athletics Certification recommendation that included gender equity as an element of certification.[360]

In 1993, the NCAA began an "athletics certification" process for Division I schools.[361] The process is meant to ensure that Division I institutions comply with the operating principles and bylaws of the

354. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,134 (1975) (reporting NCAA's opposition during the drafting and the comment periods for the Title IX regulation).

355. NCAA v. Califano, 444 F. Supp. 425, 429 (D. Kan. 1978), *rev'd*, 622 F.2d 1382 (10th Cir. 1980).

356. Ass'n for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 492 (D.D.C. 1983).

357. NAT'L COLLEGIATE ATHLETIC ASS'N, FINAL REPORT OF THE NCAA GENDER-EQUITY TASK FORCE 1 (1993) [hereinafter NCAA GENDER-EQUITY TASK FORCE] (on file with the *University of Michigan Journal of Law Reform*).

358. *Id.*

359. *Id.* at 2.

360. *Id.* at 8.

361. NCAA DIVISION I ATHLETICS CERTIFICATION HANDBOOK 3 (2000), http://www.ncaa.org/databases/selfstudy/athletics_cert_program.html (on file with the *University of Michigan Journal of Law Reform*).

NCAA in four areas: governance and rules compliance; academic integrity; fiscal integrity; and commitment to equity.[362] The NCAA's commitment to equity requires institutions to "demonstrate that it is committed to, and has progressed toward, fair and equitable treatment of both male and female student-athletes and athletics department personnel."[363]

Similar to accreditation reviews of educational institutions, the certification process begins with an institutional self-study that includes a written plan for addressing gender equity in the intercollegiate athletics program at the institution.[364] In the fall of 1998, I wrote to nearly 200 Division I schools asking for the gender equity plan they had written as part of this NCAA certification process.[365] These plans provided an idea of how schools planned to comply with Title IX. Schools are not required to make their plans public, and only fifty schools complied with my request.[366]

The NCAA did not prescribe a format for these plans, and the fifty plans examined ranged from simple one page documents to several that were more than thirty pages long. Some plans only discuss programmatic changes, such as changing which teams are entitled to training tables, and other schools focus only on the number of student athletes. Most plans, however, have both an analysis of the participation rates for the last three or five years and a discussion of the various programmatic changes or institutional adjustments. In addition to those changes that speak directly to equalizing specific programmatic benefits or resources, several schools have adopted policies that address the "perception of inequality." For example, plans call for the adoption of *written* policies for teams to address the misconception that an informal policy has gender bias; plans require training of coaches on the issues of sexual harassment and the university's procedures for dealing with

362. *Id.*

363. NCAA ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT § 4.1 (2000), http://www.ncaa.org/databases/selfstudy/athletics_cert_program.html (on file with the *University of Michigan Journal of Law Reform*).

364. *Id.* Plans must include measurable goals the institution intends to achieve, steps the institution will take to achieve those goals, persons responsible and timetables.

365. Division I schools have the largest athletic programs. The NCAA divides Division I into three parts: Division I-A has the largest football programs, Division I-AA has slightly smaller football programs, and Division I-AAA has no intercollegiate football programs. Schools in Division I-AA are not in my sample and are excluded from this study.

366. In order to encourage as many schools as possible to send their plans, I promised anonymity. Several schools gave reasons why they did not send their plans. One frequent reason cited was that they were "currently undergoing certification process" or "the gender equity plan is unavailable due to a change in administration." The most common reason received for an institution not sending its plan was a decision to keep it confidential. The majority of schools, however, did not answer the request at all.

sexual harassment claims; and other plans suggest developing formal schedules to address women's concerns about access to programs, for instance strength and conditioning schedules. Given the limited number of replies and the differences in plan formats, I did not attempt a quantitative analysis. Still, the plans are useful as illustrations and examples of institutions' approaches to compliance with the requirements of Title IX.

There are two obvious ways to comply with Title IX's proportionality requirement. Institutions may supplement women's athletic programs so that the number of participants and the money spent are similar to the number of participants and money spent on men's athletic programs, or they may reduce the number of participants and money spent on men's athletic programs.[367] Because of the costs associated with increasing women's opportunities, the second option—cutting men's sports—at first seemed more likely. The worry was that institutions would eliminate men's nonrevenue sports or make serious cuts in football squads. The gender equity plans studied overwhelmingly took the expansion track. Only four institutions mention specifically that they planned to eliminate a men's sport, and none mentioned cuts in football. Another stated that men's wresting and gymnastics were discontinued in 1980 and 1985, respectively, "to enhance the women's program" but there is no evidence of the subsequent "enhancement" as such in their women's program or of a more favorable male/female participation ratio.

Most plans adopt the same general strategies of compliance: add women's sports, cap men's teams, and fully fund existing sports. Based on these plans, soccer and softball were the women's sports most commonly added in the early 1990s, or in plans to be added in 1998 or 1999. The gold medal success of the U.S. soccer and softball teams reflect the growing interests in these sports. Rowing, or crew, is the next most common sport to be added; its advantage is that large numbers can participate without extensive previous experience, helping to reduce the male/female participation ratio. Lacrosse is the other sport mentioned by more than just a few schools.[368]

Capping men's teams, or "roster management," was one of the initial strategies for Title IX compliance, but, according to these plans, it originally met with little success, especially with baseball and track teams. Some schools specifically say roster management is to control particular sports, but none of these mention football,

367. *See supra* Part II.A.2.

368. *See infra* text accompanying notes 407–08.

the sport with the largest teams. In fact, none of the plans mention the size of their football team except in general discussion or when listing all sports provided at the institution. Roster management has also been adopted as a strategy for increasing women's participation. One school has an aggressive walk-on program for women in order to increase its female participation ratio from within ten percent to within five percent of its female undergraduate enrollment without adding a sport. Another school plans to reach parity in its participation rates by increasing the size of its women's track team from 50 to 120 women over four years, while leaving men's track at fewer than 50 participants. It has no concrete plans to make this expansion occur other than a policy to encourage the coaches to field "full" squads.

Most of these schools fully fund each sport to the maximum number of scholarships allowed by the NCAA. If an institution does not, however, the gender equity plan addresses the issue. Typically, there will be a plan to phase in scholarships, especially if the school is adding a new team. The big question here is whether the additional scholarships will be funded with new money or through internal reallocation. Most plans raise the issue but do not settle it.

Most of these gender equity plans systematically review the factors listed in the Title IX regulation, and reiterated by the *Policy Interpretation*, to determine whether equal athletic opportunity is available in a particular program. In many cases, the institutions find that they are in compliance or that observed differences are not based on gender, but rather, reflect differences in sports, an exception contemplated by the regulation and *Policy Interpretation*. Other plans set out a timetable by which the institution will upgrade the existing women's sports program, for example, upgrading the women's sports offices or the women's locker rooms or standardizing travel and per diem allowances. Still other plans are "plans to comply," for example, to make sure travel dollars are equivalent or that marketing efforts are similar, but the tone is "we aren't doing this now, though we will." In addition to upgrading parts of their programs, some schools take the opportunity to eliminate benefits now offered only to men to avoid having to extend them to women's teams. One school canceled the country club membership for the football coach; another eliminated its training table. In addition, most schools have eliminated separate administrative structures for men's and women's athletic programs. Under such a move, one university assigned a male staff member to travel with some women's teams and a female staff member to travel with

some men's teams. In this way, the department was able to uncover and correct subtle or unconscious differences between the treatment of men's and women's teams.

Nearly all of the gender equity plans measured their compliance with whether they have effectively accommodated the interests and abilities of male and female students under the first prong of the *Policy Interpretation*—substantial participation rates. Some institutions also depend on their ability to show that they have history and continuing practice of program expansion which is responsive to the interests and abilities of women. No school asserts that it has tried to expand the athletic opportunities for women athletes but has been unable to find interested and skilled women athletes. Only one school asserts that it is currently in compliance with Title IX because it has effectively accommodated the interests of women, although the plan is silent on how it accomplished this. Not surprisingly, each plan illustrates that the institution understands the requirements of Title IX compliance. It is also not surprising, however, that most plans reflect an optimism about the school's ability to reach predicted participation rates. An examination of those rates, as well as other information gleaned from the institutions' Equity in Athletics Disclosure Act[369] forms, follows.

B. Equity in Athletics Disclosure Act: Information and Analysis

In 1994, Congress enacted the Equity in Athletics Disclosure Act (EADA).[370] This statute requires all coeducational institutions of higher education that participate in any federal student financial assistance aid program, and have intercollegiate athletic programs, to provide specific information on their athletic programs.[371] All institutions must prepare and make available annual reports on participation rates, scholarships, and other financial information on men's and women's intercollegiate athletic programs.[372] The legislation helps students and the public get information about an institution's compliance with Title IX and, by making the information available to the public, pressures schools to comply with the

369. 20 U.S.C. § 1092(g) (2000).
370. *Id.*
371. *Id.*
372. *Id.*

law.[373] Neither the legislation nor the implementing regulations[374] prescribe a particular form for the report; nor did they originally specify where institutions should make their reports.[375]

In 1996, the NCAA decided to combine the requirements of the EADA and its own gender equity survey into one form and provided its member institutions with a suggested format in which to report the data.[376] Five years earlier, the NCAA had surveyed its members' expenditures for women's and men's athletics programs.[377] The study was not designed to measure Title IX compliance, but the data did allow for comparison between men's and women's programs. According to the NCAA Gender-Equity Task Force, the analysis was disturbing: "undergraduate enrollment was roughly evenly divided by sex, but men constituted 69.5 percent of the participants in intercollegiate athletics and their programs received approximately 70 percent of the athletics scholarship funds, 77 percent of operating budgets, and 83 percent of recruiting money."[378] The Gender-Equity Task Force, established in 1992 recommended the NCAA repeat the gender-equity survey every five years.[379] The NCAA, however, releases this data only in aggregate form.[380]

In order to get information on specific schools, in the fall of 1998, I requested Equity in Athletics Disclosure Act (EADA) information from more than 400 NCAA member schools. The EADA requires schools to provide a listing of the varsity teams, the number of participants, the total operating expenses, the amount of athletically-related student aid, and the revenue and expenses generated by men's and women's programs as well as information about coaches and their salaries.[381]

I was particularly interested in information about football teams and how the existence of a football program affected an institution's

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373. *See* Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 348–49 (1999) (suggesting that publishing Title IX reports would facilitate progress towards gender equity).

374. 34 C.F.R. § 668.48 (1999).

375. A 1998 amendment, Pub. L. No. 105–244 (codified at 20 U.S.C. § 1092(g)(4)), requires institutions to submit their EADA report to the Secretary of Education; the Secretary must prepare a report to Congress by April 1, 2000 to be made available to the public.

376. NCAA GENDER EQUITY-STUDY: SUMMARY OF RESULTS 2 (April 1997) [hereinafter NCAA GENDER-STUDY] (on file with the *University of Michigan Journal of Law Reform*).

377. NCAA GENDER-EQUITY TASK FORCE, *supra* note 357, at 1.

378. *Id.*

379. NCAA GENDER-EQUITY TASK FORCE, *supra* note 357, at 6. For an interesting account of the working of the NCAA task force, see James Whalen, *Gender Equity or Title IX*, 5 KAN. J.L. & PUB. POL'Y 65 (1996).

380. *See* NCAA GENDER-STUDY, *supra* note 376, at 3.

381. 20 U.S.C. § 1092 (2000).

Title IX compliance, so I requested EADA information from Division I-A schools (110 schools with big-time football and basketball programs), Division I-AAA schools (79 schools with big-time basketball and no intercollegiate football program), and 215 Division III schools with football and basketball programs. I received 246 responses with usable information: for Division I-A, 89 schools; for Division I-AAA, 50 schools; and for Division III, 107 schools.[382] The data collection was repeated in Fall 1999; to keep the same comparisons, I asked the same 404 institutions for their EADA information. I received 329 responses with usable information: for Division I-A, 92 schools; for Division I-AAA, 65 schools; and for Division III, 172 schools.[383]

TABLE 1
GENDER EQUITY SURVEY RESULTS

2000 Data: Collected by Lamber						
NCAA Division		Undergrad Enrollment	Numbers of Athletes	Difference	Aid($)	Recruiting Expenses
I-A (n=92)						
	women	51%	42%	-9	39%	30%
	men	49%	58%	+9	61%	70%
I-AAA (n=65)						
	women	57%	48%	-9	52%	43%
	men	43%	52%	+9	48%	57%
III (n=172)						
	women	52%	38%	-14	na	30%
	men	48%	62%	+14	na	70%

382. The overall response rate in 1998–99 was 61%. Within each category, the response rate was as follows: 81% for Division I-A; 63% for Division I-AAA; and 50% for Division III. Division I-A schools are overwhelmingly public institutions (82%); Division I-AAA schools are mixed (56% public); and Division III schools are overwhelmingly private (16% public).

The data published by the NCAA in its first gender equity study is from the academic year 1990–91. It was published in March 1992 and is referred to as 1992 data. Similarly, the NCAA's second gender equity study was based on information from the 1995–96 school year, was published in April 1997, and is referred to as 1997 data. For consistency, my data from the 1997–98 school year will be referred to as 1999 data.

The NCAA data on Division III includes all Division III schools whereas my 1999 data includes only Division III schools that sponsor intercollegiate football. The football group is about two-thirds of the total membership of Division III.

383. I excluded those responses with the wrong year or incomplete information. The overall response rate in 1999–2000 was 81%. Within each category, the response rate was as follows: 91% for Division I-A; 82% for Division I-AAA; and 80% for Division III. The public/private split is mirrored in this sample (Division I-A 84% public, Division I-AAA 52% public, and Division III 16% public).

TABLE 1 (CONTINUED)

1999 Data: Collected by Lamber						
NCAA Division		Undergrad Enrollment	Numbers of Athletes	Difference	Aid($)	Recruiting Expenses
I-A (n=89)						
	women	51%	39%	-12	38%	28%
	men	49%	61%	+12	62%	72%
I-AAA (n=50)						
	women	57%	47%	-10	52%	40%
	men	43%	53%	+10	48%	60%
III (n=107)						
	women	52%	39%	-13	na	29%
	men	48%	61%	+13	na	71%
1992 Data: Collected by NCAA						
NCAA Division		Undergrad Enrollment	Numbers of Athletes	Difference	Aid ($)	Recruiting Expenses
I-A (n=98)						
	women	49%	29%	-20	28%	16%
	men	51%	71%	+20	72%	84%
I-AAA (n=83)						
	women	53%	36%	-17	42%	25%
	men	47%	64%	+17	58%	75%
III (n=227)						
	women	uk	35%	uk	na	uk
	men	uk	65%	uk	na	uk
% calculated on the basis of numerical means. uk = unknown na = not available						

The results show gradual improvement. According to the data for the 1997–98 school year, women constituted almost 52% of the undergraduate enrollment, but men constituted 60% of the participants[384] in intercollegiate athletics, and men's programs

384. "Participants" include all students who practice with the varsity team and receive coaching as of the day of the first scheduled intercollegiate contest of the designated reporting year, including junior varsity team and freshman team players if they are part of the overall varsity program. The Secretary believes that a reasonable count of participants would also cover all students who receive athletically-related student aid, including redshirts, injured student athletes, and fifth year team members who have already received a bachelor's

received approximately 66% of the athletic scholarship funds[385] and 57% of the recruiting budget.[386] As one might expect, there are differences among the NCAA divisions. In Division I-A schools, women were slightly more than half of the undergraduate enrollment (51%), while men constituted 61% of the participants in intercollegiate athletics and received 62% of the athletic scholarship funds and 72% of the recruiting budget. In Division I-AAA, women constituted 57% of the undergraduate enrollment, and men were 53% of the athletic participants and received 48% of the athletic aid and 60% of the recruiting budget. In Division III, women were 52% of the undergraduate enrollment, and men constituted 61% of the athletic participants and received 71% of the recruiting budget.[387] For the 1998–99 school year, women continued to constitute more than half of the undergraduate enrollment (52.5%), and men constituted 58% of the athletes, with their programs receiving approximately 55% of the athletic scholarships and 65% of the recruiting budget.

The 1999 data shows non-football schools (Division I-AAA) do the best in terms of proportionality, substantiating the claim of Title IX opponents that gender equity defined in terms of proportionality is difficult as long as football participants are counted in the mix. This difference disappears in the 2000 data, however, at least with regard to Division I schools. One might also argue that schools with large football programs would have even more difficulty complying with Title IX than Division III schools, where the teams are smaller and the costs of the sport are less.[388] To the contrary, this data shows that Division III schools fare

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degree. Equity in Athletics Disclosure Act, 60 Fed. Reg. 61,424, 61,434 (Nov. 29, 1995) (to be codified at 34 C.F.R. pt 668).

385. "*Athletically-related student aid* means any scholarship, grant, or other form of financial assistance, the terms of which require the recipient to participate in a program of intercollegiate athletics at an institution of higher education in order to be eligible to receive that assistance." 34 C.F.R. § 668.48(b)(1)(1999).

386. "*Recruiting expenses* means all expenses institutions incur for recruiting activities, including but not limited to expenditures for transportation, lodging, and meals for both recruits and institutional personnel engaged in recruiting, all expenditures for on-site visits, and all other expenses related to recruiting." *Id.* § 668.48(b)(3).

The "operating" expense information from the EADA forms was not computed because so many forms had incomplete information in this section. Information from the table on revenue and expenses was computed.

387. Division III schools do not award athletic-related aid.

388. According to the 2000 data, the average size of a Division I-A football team is 117 participants; the minimum number is 90 and the maximum number is 205. The average size of a Division III football team is 85 participants; the minimum is 26 and the maximum is 181. According to the 1997 NCAA data, the average operating expenses for Division I-A football was $1,451,300 and for Division III football, $57,300. NCAA GENDER-EQUITY STUDY, *supra* note 376, at 25, 93.

worse, on average, in terms of proportionality than Division I-A schools.

This summary data, however, mask individual differences. To determine if there were differences among NCAA divisions in compliance with Title IX, I constructed a "participation compliance" measure.[389] While Title IX does not specify what constitutes "substantial proportionality," some out-of-court settlements suggest women's athletic participation within 5% of their undergraduate enrollment is an appropriate definition.[390]

TABLE 2
PARTICIPATION COMPLIANCE

1999 DATA 1997–98 SCHOOL YEAR		
	AT 5% LEVEL	AT 3% LEVEL
DIVISION I-A	14/89 = 16%	8/89 = 9%
DIVISION I-AAA	11/50 = 22%	4/50 = 8%
DIVISION III	9/107 = 8%	5/107 = 5%
2000 DATA 1998–99 SCHOOL YEAR		
	AT 5% LEVEL	AT 3% LEVEL
DIVISION I-A	23/92 = 25%	15/92 = 16%
DIVISION I-AAA	14/65 = 22%	9/65 = 14%
DIVISION III	19/172 = 11%	8/172 = 5%

Thirty-four of the 246 schools in my sample would pass this 5% proportionality test: 14/89 (16%) Division I-A schools; 11/50 (22%) Division I-AAA schools; and 9/107 (8%) Division III schools. I also constructed a more stringent compliance measure, asking how many schools would be in compliance if women's athletic participation was within 3% of their enrollment among undergraduates.[391] Only seventeen schools fell into this category:

389. As the Policy Interpretation suggests, the percentage of female athletes is compared with the percentage of female undergraduates.

390. *E.g.*, Neal v. Bd. of Trs. of Cal. State Univ., 198 F.3d 763, 765 (9th Cir. 1999); *see also* Farrell, *supra* note 63, at 1041.

391. Other settlements suggest the 3% benchmark. Brake & Catlin, *supra* note 47, at 67.

8/89 (9%) Division I-A schools; 4/50 (8%) Division I-AAA schools; and 5/107 (5%) Division III schools.[392]

For the 1998–99 school year the numbers improve; 56 of the 329 schools in the sample met the 5% test: 23/92 (25%) Division I-A schools; 14/65 (22%) Division I-AAA schools; and 19/172 (11%) Division III schools. The numbers also improve with the 3% test: 15/92 (16%) Division I-A schools; 9/65 (14%) Division I-AAA schools; and 8/172 (5%) Division III schools.

Because differences in football teams are part of the definitional differences among these divisions, if football affected a school's ability to comply with the proportionality provisions of Title IX, one would expect to see differences in these "compliance rates." At the 3% level, the difference in the compliance rates is slight; at the 5% level, it is larger but still fairly small. While twice as many Division I-A schools met the 5% test as do Division III schools, both divisions are football schools. Since Division I-A represents the largest football programs, typically the most vocal opponents of Title IX proportionality, one might expect any difference in Division I-A and Division III to be reversed, with more Division III schools meeting the 5% test. Still, Division I-A schools have larger athletic budgets and have more financial flexibility to accommodate new athletic interests and abilities. Looking at the 2000 data, the most striking figure is the change in compliance for Division I-A schools. The percentage of schools meeting the 5% test remains the same for Division I-AAA schools; this is also true of the percentage of schools meeting the 3% test at Division III schools.

There are bigger differences in terms of proportion of money spent on recruitment. I compared the percentage of female athletic participants with their percentage of the recruitment budget. Using the same 5% test,[393] more schools meet this proportionality test, but there were bigger differences among the NCAA divisions. In the 1999 data, of the 232 schools with usable information on this measure, nearly one quarter came within the 5% test. There were 12/89 (13.5%) Division I-A schools, 15/50 (30%) Division I-AAA schools, and 30/93 (32%) Division III schools that meet the test. Using the more stringent 3% test, the number of schools that meet the test dropped in half, but the differences among the divisions remained. There were 5/89 (6%) Division I-A schools, 11/50

392. Using the 1997 NCAA data, *USA Today* reported that 9 of 108 (8%) Division I-A schools, the same number as in 1995, would meet the 5% proportionality test and that 12 of 78 (15%) Division I-AAA would also meet the test. Erik Brady & Tom Witosky, *Title IX Improves Women's Participation*, USA TODAY, Mar. 3, 1997, at 4C.

393. The question asked here was for how many schools was the percentage spent on women recruitment plus or minus 5% of the percentage of female athletic participants.

(22%) Division I-AAA schools, and 16/93 (17%) Division III schools that met the 3% test. The 2000 data is similar. Of the 307 schools with usable information on this measure, 27% come within the 5% test. There were 15/92 (16%) Division I-A schools, 28/65 (43%) Division I-AAA schools, and 40–150 (27%) Division III schools. Using the 3% figure, the number of schools that meet the test drops, and only Division I-AAA is different from the other divisions. There were 12/92 (13%) Division I-A schools, 15/65 (23%) Division I-AAA schools, and 19/150 (13%) Division III schools. Again, Division I-AAA, the non-football schools, show the best rate of compliance and the biggest improvement.

TABLE 3
RECRUITMENT COMPLIANCE

1999 DATA 1997–98 SCHOOL YEAR		
	AT 5% LEVEL	AT 3% LEVEL
DIVISION I-A	12/89 = 13.5%	5/89 = 6%
DIVISION I-AAA	15/50 = 30%	11/50 = 22%
DIVISION III	30/93 = 32%	16/93 = 17%
2000 DATA 1998–99 SCHOOL YEAR		
	AT 5% LEVEL	AT 3% LEVEL
DIVISION I-A	15/92 = 16%	12/92 = 13%
DIVISION I-AAA	28/65 = 43%	15/65 = 23%
DIVISION III	40/150 = 27%	19/150 = 13%

I constructed a similar measure for athletic financial aid. I compared the percentage of female athletic participants with their percentage of the athletic financial aid. In the 1999 data, nearly three-fourths of the Division I-A schools (65/88) met the 5% test[394]; using the 3% test, less than half of the Division I-A schools met the test (40/88).[395] In the 2000 data, the numbers and percentages

394. Thus, an institution is in compliance if the percentage of athletic financial aid for female athletes was within 5% of the percent of female athletes.

395. In the 1999 data, 52% (26/50) Division I-AAA schools met this 5% test; 38% (19/50) met the 3% test. In the 2000 data, 48% (31/65) Division I-AAA schools met this 5% test; 32% (21/65) met the 3% test. These figures may be misleading, however, because a significant number of these schools give women athletes proportionately more aid than their male athletes. The average ratio of male aid to female aid is about 100: 110; the mini-

drop. At the 5% level, 64% of the Division I-A schools meet this test (59/92); using the 3% level, only 40% of Division I-A schools meet the test (37/92). Both of these compliance measures—recruitment and aid—compare the recruitment or aid ratio with the percentage of women athletic participants, not their representation in the undergraduate population. Thus, this comparison asks only whether current women athletes receive their proportional share of the aid and recruitment money.

TABLE 4
AID COMPLIANCE

	DIVISION I-A	
	AT 5% LEVEL	AT 3% LEVEL
1999 DATA	65/88 = 74%	40/88 = 45%
2000 DATA	59/92 = 64%	37/92 = 40%

Since 1997, the biggest differences between football and non-football schools—or among divisions—is in revenue and expenses.[396] In Division I-A schools, revenues exceeded expenses in both 1997 and 1999, but there was extraordinary growth in both revenue and expenses in 1999.

mum ratio is 10:7, and the maximum ratio is 2:3. As the "aid compliance" figure constructed asks only if participation ratio minus the aid ratio is plus or minus 5% (or 3%), it does not count those institutions where the participation ratio minus the aid ratio is greater than plus 5% (or 3%).

Since Division III schools do not give athletic-related aid, they are not included in this calculation.

396. The statute defines revenues as "gate receipts, broadcast revenues, appearance guarantees and options, concessions, advertising, . . . student activity fees, or alumni contributions." 20 U.S.C. § 1092(g)(1)(I)(ii) (1998). It defines expenses as "grants-in-aid, salaries, travel, equipment, . . . supplies, . . . [and] overhead." *Id.* at § 1092(g)(1)(J)(ii).

Tentative analysis of revenue and expenses information in the 2000 data suggests that the amounts of revenue and expenses are consistent with those reported in 1999. There are too many inconsistencies with how institutions reported the information, however, to permit a parallel presentation of the information from the 1998–99 school year. Once the federal government begins to collect the EADA reports and writes its own report, one can hope for monitoring for consistency in reporting so that data across schools will be comparable.

TABLE 5
AVERAGE REVENUE & EXPENSES

DIVISION I-A				
	REVENUE*		EXPENSES*	
	1997**	1999†	1997**	1999†
FOOTBALL	5,925	8,156	3,168	4,879
MEN'S BASKETBALL	2,316	3,134	968	1,430
OTHER	1,319	1,188	2,254	2,392
TOTAL MEN'S	9,561††	12,478	6,388	8,701
WOMEN'S BASKETBALL	103	212	534	790
OTHER	476	717	1851	2,620
TOTAL WOMEN'S	579	929	2,386	3,410
NOT ALLOCATED BY GENDER	3,169	6,582	4,311	7,578
GRAND TOTAL	13,308	19,989	13,087	19,689

* dollars in thousands
** n = 93
† n = 80
†† not exact total due to rounding

TABLE 5 (CONTINUED)

DIVISION I-AAA				
	REVENUE*		EXPENSES*	
	1997**	1999†	1997**	1999†
FOOTBALL	0	0	0	0
MEN'S BASKETBALL	439	780	576	721
OTHER	140	469	774	905
TOTAL MEN'S	579	1250	1,351	1,627
WOMEN'S BASKETBALL	22	202	371	471
OTHER WOMEN	102	355	706	888
TOTAL WOMEN'S	124	557	1,059	1,359
NOT ALLOCATED BY GENDER	738	1,778	392	1,076
GRAND TOTAL	1441	3585	2802	4061

*dollars in thousands
**n = 69
† n = 47

Revenue exceeded expenses in 1997 by $221,000. In 1999 the excess was $300,000, but the average amount of revenue and expenses was considerably higher in 1999 than in 1997.[397] Division I-A schools have big-time football and basketball programs and are characterized by large state universities, 82% being public institutions. The average undergraduate population of these 89 schools is 16,224 students; however, the size of the institution ranges from a high of 37,615 undergraduate students to a low of 2,649 undergraduates. On average women outnumber men as undergraduates (51%), and at some schools, more than 60% of the undergraduates are women.[398]

397. Revenue and expenses both increased by 50%.

398. The lowest percentage of female enrollment is 16% and the largest is 60%. The 92 schools in the 2000 data have a similar profile.

TABLE 6

DIVISION I-A AVERAGE RECRUITING EXPENDITURES				
1997	n=94	$256,511 men (75%)	$84,550 women (25%)	$341,061 total
1999	n=89	$324,019 men (72%)	$125,086 women (28%)	$ 449,105 total
2000	n=92	$351,615 men (70%)	$143,932 women (30%)	$495,547 total
DIVISION I-A AVERAGE ATHLETICALLY-RELATED STUDENT AID				
1997	n=94*	$1,575,821 men (66%)	$824,889 women (34%)	$2,400,710 total
1999	n=88	$2,014,564 men (62%)	$1,228,048 women (38%)	$3,242,612 total
2000	n=92	$2,136,233 men (61%)	$1,391,226 women (39%)	$3,527,459 total
*Estimated				

The average recruiting expenditures increased by 32% from 1997 to 1999, with the expenditures for women's teams increasing by 48%, while expenditures for men's teams increased by only 26%. In the end, women's share of the average recruiting expenditure changed by only 3%. In the 2000 data, the women's share increased only by another 2%. Athletically-related student aid also grew from 1997 to 1999, increasing by 35%. Aid to women increased by 49%, while aid to men increased by 28%. In the end the women's average share of the aid changed by 4%. In the 2000 data, the women's shares increased by only 1%, but their share of aid more closely approximated their athletic participation rate.

Division I-AAA schools operated at a deficit in both 1997 and 1999, but in 1999, these schools generated more revenues and the losses were smaller than in 1997. In contrast to Division I-A, expenses exceeded revenue in 1997 by $1,361,000; in 1999, Division I-AAA lost less money, but there was still a difference between revenue and expenses of $476,000. Like Division I-A schools, the average amount of revenue and expenses was considerably higher in 1999 than in 1997: revenue increased by 150%, and expenses increased by slightly less than 50%. Division I-AAA schools have large basketball programs but no intercollegiate football programs

and are a mix of public and private institutions, with 56% being public institutions. The average undergraduate population of these 50 schools is 6,299 students; however, the size of the institutions ranges from a high of 16,704 undergraduate students to a low of 743. Division I-AAA schools have a higher percentage of women students. On average, women constitute 57% of the undergraduates, and at some schools, more than 70% of the undergraduates are women.[399] The average participation rate for women at Division I-AAA schools (48%) is higher than Division I-A schools, but it still does not match average enrollment rate at Division I-AAA schools.

TABLE 7

DIVISION I-AAA AVERAGE RECRUITING EXPENDITURES				
1997	n=68	$47,934 men (75%)	$27,300 women (25%)	$75,234 total
1999	n=50	$56,640 men (60%)	$37,551 women (40%)	$94,191 total
2000	n=65	$58,721 men (57%)	$44,098 women (43%)	$102,819 total
DIVISION I-AAA AVERAGE ATHLETICALLY-RELATED STUDENT AID				
1997	n=68*	$561,200 men (51%)	$537,342 women (49%)	$1,098,542 total
1999	n=50	$670,110 men (48%)	$715,123 women (52%)	$1,385,233 total
2000	n=65	$746,597 men (48%)	$825,219 women (52%)	$1,571,816 total
*Estimated				

The average recruiting expenditures increased by 25% from 1997 to 1999; the expenditures for women's teams increased by 37.5%, while expenditures for men's teams increased by only 18%. Women's share of the average recruiting expenditure changed by 15%. In the 2000 data, average recruiting expenditures increased 9%, and the women's share increased 3% from their 1999 levels.

399. Average enrollment for men at these Division I-AAA schools range from a low of 28% and a high of 50%. The 65 schools in the 2000 data have a similar profile.

Athletically-related student aid also grew from 1997 to 1999, increasing by 26%. Aid to women increased by 33%, while aid to men increased by 19%. In the end, the women's average share of the aid changed by only 3%, but it was the first time that the women's share was more than the men's. In the 2000 data, athletically-related aid increased another 13%, but the ratio of male to female aid remained the same.

It is not possible to make these same comparisons for Division III schools because they are not required by the NCAA to report the same revenue and expenses.[400] Division III schools have smaller football and basketball programs, do not give athletically-related aid, and are characterized by small, private schools, with only 16% being public. The average undergraduate population is 2,336, and the institutions range from a low of 501 undergraduate students to a high of 10,364. On average, women outnumber men as students, 52% to 48%, but the range is much greater than in other divisions, as the average percentage of women undergraduates ranges from a low of 11% to a high of 67%.[401] Only in this category was the increase in 1999 for recruiting larger for men than for women. The average recruiting expenditures increased by 50% from 1997 to 1999; while the expenditures for women's teams increased by 45%, expenditures for men's teams increased by 51%. Women's share of the average recruiting expenditure decreased by 1%. In the 2000 data, recruiting expenditures increased 6%, and both men's and women's share increased by 6%.

TABLE 8
AVERAGE RECRUITING EXPENDITURES

DIVISION III				
1997	n=217	$11,701 men (70%)	$4,983 women (30%)	$16,684 total
1999	n=107	$17,707 men (71%)	$7,239 women (29%)	$24,946 total
2000	n=150	$18,799 men (70%)	$7,689 women (30%)	$26,488 total

400. The 2000 data does include this information from at least some schools. Inconsistencies with reporting prevent an analysis similar to that in the text for Division I schools. Tentative analysis suggests, however, that Division III schools have negative net revenues but spend 54% more on their athletic programs than they produce. In terms of specific sports, the data suggest that schools spend 76% more on their football programs than they produce but only 49% more on women's basketball than it produces.

401. The 172 schools in the 2000 data have a similar profile.

Next is a comparison of Division I-A football with Division III football. Schools with big-time football programs have been the most vocal opponents of Title IX and, in particular, its proportionality provision. They originally argued that football should be exempt from Title IX or that revenue producing sports should be exempt from the calculations for proportionality.[402] It is difficult to know what to make of these objections, given that almost 75% of Division I-A schools have positive net football revenues.[403] Comparing football revenues and expenses in 1999, the average positive net revenue is $3.3 million. Negative net revenue can also be significant. For the 80 division I-A schools in the 1999 sample, the difference between revenues and expenses ranges from negative $3.09 million to positive $16 million. In the 2000 data, average positive net revenue is $4.3 million; for the 90 Division I-A schools in the 2000 sample, the difference ranged from negative $2.7 million to positive $21 million. In comparison, most Division III football schools have negative net football revenues.[404] Comparing football revenues and expenses in 1999, the average is negative net revenue of $69,000. The range is not as great for Division III schools: they range from a low of negative $181,846 to a high of $58,170. In 2000, the average is a negative net revenue of $75,000. The range is greater—from a low of negative $307,000 to a high of $70,000. Thus, it seems that if football matters to whether institutions can comply with Title IX, it matters more for Division III schools, where football is a money-loser. Without exact data, one might expect Division III schools to find it easier to comply with Title IX, with its focus on students and the prohibition of athletically-related student aid. But the numbers suggest that it is not easier; these schools do not do a better job with Title IX compliance. Given the money-making aspects of Division I-A football, these schools have more opportunity to expand their athletic programs so as to comply more easily with Title IX.

Finally, I compared expenses for women's sports at these football schools with the schools' net football revenues. In the 1999 data, at Division I-A schools, the average expenses for women's

402. 40 Fed. Reg. at 24,128, 24,134 (1975).

403. Of the 80 Division I-A schools in the 1999 data, 58 (73%) had positive net revenues, 1 (1%) broke even, and 21 (26%) had negative net revenues. Of the 90 Division I-A schools in the 2000 data, 64 (71%) had positive net revenues and 26 (29%) had negative net revenues.

404. In the 1999 data, of the 69 schools for which there was useful data on this measure, 13 (19%) had positive net revenues, 4 (6%) broke even, and 52 (75%) had negative net revenues. In the 2000 data, of the 153 for which there was useful data on this measure, 31 (20%) had positive net revenues, 13 (9%) broke even, and 109 (71%) had negative net revenues.

sports was $3.4 million, ranging from a low of about $750,000 to a high of $8.7 million. In the 2000 data, the average expenses for women's sports was $4.2 million, ranging from a low of $1.1 million to a high of $13.5 million. At Division III schools, the average expenses for women's sports in 1999 was $296,807, ranging from a low of $65,551 to a high of $796,737. In the 2000 data, the average expenses were $311,000, with a low of $40,500 to a high of $1.1 million. Comparing these expenses with the schools' net football revenues, the average ratio for Division I-A schools is 71:100, that is, on average, football revenues have the potential to cover 70% of the women's sports expenses. The minimum ratio is negative 113:100; the school loses $113 on football for every $100 it spends on women's sports. The maximum ratio is 324:100, meaning that the school could pay for women's sports three times and still have positive net revenue. Overall, 25 out of 80 schools could cover their women's sports expenses from their net football revenue alone.[405]

The picture with Division III sports is considerably less clear. Comparing women's sports expenses with the schools' net football revenues, the average ratio is negative 32:100; that is, on average schools lose $32 on football for every $100 it spends on women's sports. The minimum ratio is negative 116:100; that is, the school loses $116 for every $100 it spends on women's sports. The maximum ratio is 12:100, that is, at best football can cover only one-eighth of its women's sports expenses.[406] Thus, it is less excusable for Division I-A sports not to be in compliance with Title IX's proportionality provisions. It is more understandable with Division III schools, where sports in general cost the university money. On the other hand, because Division III football typically does not make money, it is more difficult to support any priority claim for football at a Division III school.

Another claim from opponents of Title IX is that nonrevenue men's teams have borne the brunt of Title IX compliance, with schools eliminating men's teams in order to pay for women's teams.[407] The sports offered by NCAA institutions, however, have been remarkably stable over the last ten years. Given the rhetoric about nonrevenue men's teams and institutions' gender-equity

405. Tentative analysis of the 2000 data suggests similar numbers.

406. Tentative analysis of the 2000 data suggests similar numbers but with even greater ranges. The minimum ratio is negative 212.54:100 and the maximum ratio is 79:100.

407. *See* Weistart, *supra* note 84, at 195 n.15 (noting that the great controversy over the extent to which the reduction in sponsorships of men's wresting, swimming, and gymnastics is due to the efforts of schools to shift money over to women's sports).

plans,[408] one might expect to see sharp increases in the number of schools offering women's soccer, softball, and rowing as well as sharp decreases in the number of schools offering men's wrestling and gymnastics. The data shows the expected increases and decreases, but they are not as dramatic as one might expect.

TABLE 9

MEN'S SPORTS*					
DIVISION I-A		DIVISION I-AAA		DIVISION III	
1992	1999	1992	1999	1992	1999
basketball	football	basketball	basketball	uk	football
football	basketball	track	track	uk	basketball
track†	track	tennis	tennis	uk	soccer
golf	golf	golf	golf	uk	track
baseball	baseball	baseball	baseball	uk	baseball
tennis	tennis	soccer	soccer	uk	tennis

* arranged according to largest number of schools offering particular men's sport
† track includes indoor track, outdoor track, and cross-country
uk = unknown

WOMEN'S SPORTS*					
DIVISION I-A		DIVISION I-AAA		DIVISION III	
1992	1999	1992	1999	1992	1999
basketball	basketball	basketball	basketball	uk	basketball
volleyball	track†	tennis	track	uk	soccer
tennis	tennis	track	tennis	uk	track
track	volleyball	volleyball	volleyball	uk	volleyball
swimming	soccer**	softball	soccer	uk	tennis

* arranged according to largest number of schools offering women's sport

† track includes indoor track, outdoor track, and cross-country

** In 1999 in Division I-A softball is the seventh most offered sport after those listed followed by golf. The women's teams with the largest number of participants are rowing and track. All the rest have 28 or fewer. In Division I-AAA softball is the sixth most offered sport. The women's teams with the largest number of participants are rowing, track, and soccer. Division III women's teams are like Division I-AAA where softball is the sixth most offered sport and the teams with the largest number of participants are rowing and track.

uk = unknown

408. *See supra* text accompanying notes 348–51.

The number of schools offering some men's sports declined. For example, the number of Division I-A schools offering wrestling declined from 44 schools (47%) in 1992 to 35 schools (39%) in 1999; those offering gymnastics declined from 24 (26%) to 15 (17%); and schools offering swimming declined from 72 (77%) to 58 (65%). The number of Division I-AAA schools offering wrestling declined from 17 (21%) to 10 (20%); those offering swimming declined from 34 (41%) to 17 (34%), but there was no difference in the number of schools offering gymnastics (3).

The number of schools offering some women's sports increased. For example, the number of Division I-A schools offering soccer increased from 21 (22%) in 1992 to 77 (87%) in 1999; those offering softball increased from 54 (57%) to 63 (71%); and schools offering rowing increased from 0 in 1992 to 18 (20%) in 1999. The number of Division I-AAA schools offering soccer increased from 28 (34%) in 1992 to 38 (76%) in 1999; those offering swimming declined from 38 (46%) to 20 (40%); and 7 (14%) schools added rowing by 1999. In Division III there were 12 (11%) new schools offering rowing by 1999.

A different picture of Title IX and its application to intercollegiate athletics emerges through the information provided by the schools in their EADA forms. For example, big-time football programs may make it easier to have successful women's athletic programs, rather than support an exclusion or exemption from the requirements of Title IX. Nearly 75% of Division I-A schools report that their football revenues exceed their football expenses. Twenty-five of these schools could pay for the expenses of their women's programs through football net revenues alone. The average cash flow is negative at most Division III schools and, somewhat surprisingly, these schools lag behind Division I schools in their "participation compliance" measure. The data submitted by the schools does not support the notion that there has been wholesale elimination of men's sports in order to pay for women's sports. The average number of male athletic participants has dropped in Division I but only by less than 5% in Division I-A. And in Division III, the average number of male athletic participants has increased by almost 25%.

What is most remarkable about this data is the increase in revenue and expenses, especially at Division I schools, suggesting that compliance with Title IX is now a matter of will. The data shows that a number of institutions are currently in compliance with Title IX's proportionality test; others may be in compliance under the second or third prong of the *Policy Interpretation.*

Financial resources are available. The law is relatively clear. The only remaining obstacle to compliance by Division I institutions is either inertia or bad will. The issue in Division III schools is different. Absence of positive net revenues limits the options of these schools. Financial expansion of athletic programs seems unlikely or such expansion will come at the cost of other, probably academic, programs at the universities and colleges. The unequal status of women's sports at Division III schools is more glaring. This difference between Division I and Division III schools, rather than the existence of a football program, suggests the need for more attention to Title IX at Division III schools.

CONCLUSION

Title IX should not be confused with other civil rights statutes. When Titles VI and VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of race, the statutes ask us to do what we are already, at least theoretically, committed to do, that is, provide equal treatment. Title IX also requires equal treatment, but it demands more. Although its language parallels Title VI, Title IX challenges our perceptions, asking us to think differently about women in education. In the context of intercollegiate athletics, Title IX forces us to answer whether men are inherently more interested in sports than women, and thereby deserve to compete in greater numbers.

Title IX also challenges the expectations of men, who for years have reaped the benefit of disproportionate athletic opportunities. A recent article opens with the line, "Bill Kelley went to [college] with a dream,"[409] and now because of Title IX he can't fulfill this dream. This statement is meant to turn our sentiment in favor of Billy, but at the expense of women who have, and continue to be, underrepresented in intercollegiate athletics.

Title IX also challenges our notions of constitutionally accepted outcomes. It questions whether separate but equal is always unequal, whether differences in men and women's sports are based on real differences or grounded in stereotypes. It asks what to make of a system that treats men and women the same but in which women do not succeed on the same basis as men.

Ask the casual observer about women and intercollegiate athletics and he or she may think about the success of women in the

409. Beveridge, *supra* note 229, at 809.

1996 summer Olympics. Women athletes have always been stars at the Olympics—figure skaters Tara Lapinski and Kristi Yamaguchi, swimmer Janet Evans, gymnast Mary Lou Retton—especially in terms of television ratings and media coverage. But at the 1996 summer Olympics, it was the women's *team* sports that caught our attention and held our imagination. United States women won gold medals in softball, soccer, and basketball. Additionally, the usual stars, women gymnasts, won a team gold medal.

The reasons to support equal rights for women in athletics, and to work out what that means, go beyond the thrill of watching the skill and power of women athletes in remarkable performances at the Olympics or at a sold-out NCAA women's basketball tournament. Title IX and intercollegiate athletics are an important context in which to work out definitions of equality because participation in athletics is another important way to transform perceptions about women and their supposed limitations.